Supreme Court, U.S.
FILED
01284 FEB 28 2002
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ZANTOP INTERNATIONAL AIRLINES, INC.,

Petitioner,

v.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

PATRICK R. VAN TIFLIN
Counsel of Record
BRIGHAM COOK SMITH
HONIGMAN MILLER SCHWARTZ AND COHN LLP
The Phoenix Building
222 Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

103 pp
$10

QUESTIONS PRESENTED

1. May a state, consistent with the Commerce Clause of the United States Constitution, assess a use tax on interstate commercial air freight carriers for 100 per cent of the value of parts used in their aircraft when those aircraft spend nearly 100 per cent of their time outside that state?

2. May a state, consistent with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, subject only certain instrumentalities of commerce to a use tax, while exempting other similarly situated instrumentalities?

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties to the appellate proceeding in the Michigan Court of Appeals, whose decision below is sought to be reviewed.

Zantop International Airlines, Inc., Appellant below. Petitioner is not a subsidiary or affiliate of a publicly-owned corporation.

Revenue Division, Department of Treasury, State of Michigan, Appellee below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE STATE OF MICHIGAN HAS VIOLATED THE COMMERCE CLAUSE BY ASSESSING "USE" TAXES ON AIRCRAFT PARTS THAT WERE NOT USED IN-STATE 9

A. The Parts Have No Substantial Nexus With The State Because They Are Merely Components Of Aircraft Whose Presence In-State Is, At Best, *De Minimis* 10

B. The "Use" Tax Is Not Fairly Apportioned Because The State Collects 100 Per Cent Of The Taxes For Parts That Spend Almost 100 Per Cent Of Their Time Out-Of-State 13

1. The State's "Use" Tax Is Not Internally Consistent, And Therefore Is Not Fairly Apportioned 14

2. The State's "Use" Tax Is Likewise Not Externally Consistent, And Is Also Therefore Not Fairly Apportioned 17

TABLE OF CONTENTS – Continued

Page

C. The "Use" Tax Discriminates Against Interstate Commerce Because It Prevents Interstate Businesses From Freely Entering The State's Marketplace 21

D. The State's Imposition Of A "Use" Tax Is Not Fairly Related To The Services It Provides Because The State Provides No Services Whatsoever With Respect To These Parts 23

II. BECAUSE IT RESTS ENTIRELY ON ARBITRARY AND IRRATIONAL DISTINCTIONS BETWEEN SIMILARLY SITUATED TAXPAYERS, THE STATE'S PRACTICE OF ASSESSING "USE" TAX ON SOME TYPES OF COMMERCIAL CARRIERS BUT NOT OTHERS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Allegheny Pittsburgh Coal Co. v. County Comm. of Webster County, 488 U.S. 336 (1989) 26

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 26

Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155 (7th Cir. 1995) 8

Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1977) 22

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948) 19, 20

Central R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962) 14

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) ..*passim*

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 14

Douglas v. California, 372 U.S. 353 (1963) 3

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 30

Fargo v. Michigan, 121 U.S. 230 (1887) 20

Goldberg v. Sweet, 488 U.S. 252 (1988) ..... *passim*

Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980) 8

Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928) 27

Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954) 19

Nordlinger v. Hahn, 505 U.S. 1 (1992) 30

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Tax Comm. v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 18, 22

Romer v. Evans, 517 U.S. 620 (1996) 26

Smith v. Cahoon, 283 U.S. 553 (1931) 27, 28

Trinova Corp. v. Dept. of Treasury, 498 U.S. 358 (1991) 14

Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987) 14

United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 26

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 22

Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) 22

Williams v. Vermont, 472 U.S. 14 (1985) 7, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. am. XIV, § 1 ..... 3, 6, 24

U.S. Const. art. I, § 8, cl. 3 ..... 3, 9

STATUTES

28 U.S.C. § 1257(a) 3

Mich. Comp. Laws § 205.91 ..... 3, 4, 7

Mich. Comp. Laws § 205.92 3

Mich. Comp. Laws § 205.93 ..... 3, 12

Mich. Comp. Laws § 205.94 ..... 3, 9, 15, 25

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4004.1 8

House Legislative Analysis Section, First Analysis to House Bill 5801 (Nov. 20, 1994) 29

Lawrence H. Tribe, *American Constitutional Law* § 6-16 (3d ed. 2000) 21

Michigan Department of Treasury Letter Ruling 89-48 25

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner Zantop International Airlines, Inc. ("Zantop") respectfully requests the Court to issue a writ of certiorari to review the opinion of the Michigan Court of Appeals endorsing the State's practice of subjecting interstate air freight carriers, and only interstate air freight carriers, to a use tax for parts they cannot be fairly said to "use" in the State of Michigan (the "State").

OPINIONS BELOW

This petition seeks review of two opinions of the Michigan Court of Appeals. The first and most recent opinion is an unpublished April 24, 2001 decision of the Michigan Court of Appeals finding against Zantop on its Commerce Clause challenge, set forth at App. 1-5. The November 30, 2001 order of the Michigan Supreme Court denying leave to appeal is reported at 465 Mich. 912 (2001), and is set forth at App. 6. The unpublished January 26, 1999 opinion and order entered by the Michigan Court of Claims is set forth at App. 7-16. These decisions followed prior rulings of a non-final nature with respect to Zantop's Equal Protection challenge.

The second and previous opinion of the Michigan Court of Appeals, which reversed and remanded the case, is an unpublished decision dated May 26, 1995 and is set forth at App. 17-23. The Court of Appeals' November 28, 1995 denial of Zantop's timely motion for rehearing is set forth at App. 24. The September 27, 1996 order of the Michigan Supreme Court denying leave to appeal is

reported at 453 Mich. 893 (1996), and is set forth at App. 25. This Court's February 18, 1997 denial of certiorari on these non-final rulings is set forth at App. 26. The unpublished February 26, 1992 opinion of the Michigan Court of Claims is set forth at App. 27-32.

JURISDICTION

Zantop first challenged the taxation practices of the State of Michigan on both Commerce Clause and Equal Protection grounds in a June 7, 1991 complaint in the Michigan Court of Claims. *See* App. 33-44. In a February 26, 1992 opinion, the Court of Claims granted summary disposition to Zantop on the Equal Protection Clause challenge. *See* App. 27-32. In a May 26, 1995 split decision, the Michigan Court of Appeals reversed and remanded the Court of Claims decision. *See* App. 17-23. Zantop then moved for rehearing with the Court of Appeals, which denied the motion in a split decision on November 28, 1995. *See* App. 24. Zantop next applied to the Michigan Supreme Court for leave to appeal the Court of Appeals' decision. The Michigan Supreme Court denied such leave on September 27, 1996. *See* App. 25. Zantop then petitioned this Court for a writ of certiorari, which was denied on February 18, 1997. *See* App. 26.

While the Equal Protection challenge was on appeal, no adjudication of the Commerce Clause challenge occurred. Following denial of certiorari on the Equal Protection challenge, the Michigan Court of Claims issued a January 26, 1999 opinion and order adverse to Zantop on the Commerce Clause challenge. *See* App. 7-16. Zantop then appealed this decision to the Michigan Court of Appeals, which issued its unpublished opinion on April 24, 2001, upholding under the Commerce Clause

the State's practice of assessing a use tax. *See* App. 1-5. Zantop filed an application for leave to appeal with the Supreme Court of the State of Michigan, which entered an order denying such leave on November 30, 2001, thus prompting Zantop to file this petition. *See* App. 6.

Zantop brings both its Commerce Clause challenge and its Equal Protection challenge to the Court in this petition because both are now ripe for review. The Equal Protection challenge is not barred from review because the earlier petition was not based on a final order. Now that a final order has been entered, it is appropriate for the Court to grant certiorari on both Commerce Clause and Equal Protection grounds.

The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. § 1257(a). *See Douglas v. California*, 372 U.S. 353 (1963).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves consideration of the following: U.S. Const. art. I, § 8, cl. 3, set forth at App. 45; U.S. Const. am. XIV, § 1, set forth at App. 45; Mich. Comp. Laws § 205.91, set forth at App. 46; Mich. Comp. Laws § 205.92, set forth at App. 46-49; Mich. Comp. Laws § 205.93, set forth at App. 49-52; Mich. Comp. Laws § 205.94, set forth at App. 52-53; Michigan Department of Treasury Letter Ruling 89-48, set forth at App. 54-55.

STATEMENT OF THE CASE

This petition seeks review of two Michigan Court of Appeals decisions denying Zantop, an interstate air

freight carrier, relief from the State of Michigan's assessment of a use tax on the full value of aircraft parts Zantop used almost exclusively outside the state of Michigan. This assessment is part of a practice of unconstitutional taxation by the Michigan Department of Treasury (the "Department") and subsequent ratification by the Michigan courts. This practice violates both the Commerce Clause of the United States Constitution and the Equal Protection Clause of the United States Constitution's Fourteenth Amendment.

The Department assesses use taxes pursuant to the Michigan Use Tax Act, 1937 P.A. 94, codified as amended at Mich. Comp. Laws § 205.91, *et seq.* (the "Act"). *See* App. 46-53. The Act imposes use tax on the privilege of using, storing, or consuming tangible personal property in Michigan. The dispute forming the basis of this petition arose when the Department, in effect, assessed Zantop use taxes on labor and aircraft components Zantop acquired outside the State contained in certain "rotable" parts for its fleet of aircraft (the "parts"). Rotable parts are major aircraft parts such as engines, compressors and propellers. Like all air carriers, Zantop was required by Federal Aviation Administration (FAA) regulations to periodically remove these rotable parts from its aircraft for overhaul or replacement. *See* February 25, 1992 Partial Stipulation at ¶¶ 7-8, App. 56-60. During the taxable period at issue, October 1, 1986 through March 31, 1990, Zantop arranged for some of these rotable parts to be repaired out-of-state. The Department audited Zantop for the period at issue and, on March 11, 1991, issued to Zantop Bill for Taxes Due (Final Assessment) E763576. *See* Partial Stipulation at ¶ 14, App. 56-60.

Essentially, the Department taxed Zantop for the labor and ancillary parts used by out-of-state vendors in refurbishing the rotable parts of its aircraft – rotable parts that Zantop, of course, already owned. In its Final Assessment, the Department assessed Zantop $541,329 in tax, $54,134 in penalties, and $161,812.72 in interest. Thus, the Department levied over three-quarters of a million dollars in "use" taxes on Zantop for parts it already owned and merely had repaired – as mandated by federal law – by out-of-state vendors.

Although these parts were not "used," "stored," or "consumed" in Michigan, as required under the Act, the Department has nonetheless levied use taxes on Zantop for their full value. In fact, the repaired or replaced parts were shipped in interstate commerce from out-of-state vendors to Michigan and immediately re-installed on Zantop's aircraft, which then continued operating in interstate and international commerce. Zantop, a Michigan corporation, operates its fleet out of Michigan's Willow Run Airport (the "Airport"). *See* Partial Stipulation, ¶¶ 1, 6, App. 56-60. The actual time the fleet spends at the Airport is *de minimis*. The Airport is merely a hub from which planes are quickly loaded and dispersed to as many as 50 out-of-state airports. *See* Partial Stipulation, ¶ 12, App. 56-60. For the vast majority of the time, the Airport is empty, and only if a passerby were there at the right moment would Zantop's presence be noticeable.

In short, the fleet (and therefore the parts at issue here) spend nearly 100 per cent of their time outside the State of Michigan, and yet the State of Michigan has taxed those parts at fully 100 per cent. *Indeed, only 4/100 of one per cent of Zantop's flight hours occur within the State, and only 2/100 of one per cent of its flight miles are within the*

State. *See* App. 61-63. The State's taxation practice not only defies logic, it violates the Commerce Clause of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

The actions of the Michigan Department of Treasury, ratified by the Michigan courts, clearly violate the Commerce Clause of the United States Constitution. The Department's assessment of a use tax against Zantop flies in the face of this Court's seminal decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), which announced the test for measuring whether a state tax violates the Commerce Clause (the "*Complete Auto Transit* Test" or the "Test"). Under the *Complete Auto Transit* Test, a state tax on interstate commerce is constitutional only if it meets each of four requirements. Those requirements are that: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state. *See id; see also* Complaint, ¶ 27, App. 33-44. Because the parts at issue cannot fairly be said to be "used," "stored," or "consumed" in Michigan, while the Department nonetheless taxes them at full value, the State has violated all four requirements of the *Complete Auto Transit* Test.

In addition to violating the Commerce Clause, the State's actions have deprived Zantop of Equal Protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution. Put simply, the State of Michigan has made arbitrary and irrational distinctions in its use tax laws by taxing air freight carriers on repair parts but exempting from taxation other commercial carriers, including commercial passenger air carriers, and

cargo carriers moving via water or by land. *See* Mich. Comp. Laws § 205.91, *et seq.*, App. 46-53; Michigan Department of Treasury Letter Ruling 89-48, App. 54-55. Indeed, the State has granted exemptions to commercial passenger air carriers even though they, too, carry cargo, and often in substantial amounts. These arbitrary and irrational distinctions violate Zantop's right to equal protection of the laws. *See Williams v. Vermont*, 472 U.S. 14, 22 (1985).

Zantop comes to this Court seeking redress of these constitutional grievances and having exhausted its state remedies. Zantop first raised these challenges based on the Commerce Clause and Equal Protection Clause in its June 7, 1991 complaint in the Court of Claims for the State of Michigan. *See* App. 33-44.

In a February 26, 1992 opinion, the Court of Claims granted summary disposition in favor of Zantop on Count III of its Complaint, the Equal Protection challenge. *See* App. 27-32. In an unpublished *per curiam* opinion, two members of the Michigan Court of Appeals reversed and remanded this decision, while a third member dissented on the grounds that "a rational basis for the unequal use tax treatment" of Zantop "wholly escaped" him. App. 17-23. The Court of Appeals denied rehearing, and the Michigan Supreme Court later denied leave to appeal the Equal Protection challenge. *See* App. 24-25. On February 18, 1997 this Court denied certiorari on this aspect of the case. *See* App. 26.

Zantop incorporates its Equal Protection challenge into this petition because, when it petitioned the Equal Protection claim to this Court in 1997, no final order had been entered in this case *on the issue of Equal Protection*. The Equal Protection decision was reversed and remanded for further consideration in the Court of

Claims. Now that Zantop's case in its entirety has been determined at the state level, the Equal Protection claim is part of a final state court order. Moreover, this Court is not precluded from granting certiorari on this petition merely because it denied certiorari with respect to the Equal Protection challenge in a prior petition. "The denial of certiorari indicates no view on the merits." *Holloway v. McElroy*, 632 F.2d 605, 636 n.50 (5th Cir. 1980). Accordingly, "[a] denial of certiorari from one of these non-final decisions [of a Court of Appeals] does not preclude a grant of certiorari to review the identical issue at a later stage in the case." Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4004.1 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155, 160 (7th Cir. 1995)). Thus, now that the Equal Protection issue has been presented *at a later stage in this case*, this Court should consider it in concert with the Commerce Clause issue.

Following remand of Zantop's Equal Protection challenge, the Court of Claims found for the State on the Commerce Clause challenge, upholding the constitutionality of the use taxes. *See* App. 7-16. In an unpublished *per curiam* opinion, the Michigan Court of Appeals held that Zantop was subject to use tax because it re-installed in the State the rotable parts of its aircraft repaired outside the State. *See* Op. at 2, App. 1-5. The Michigan Supreme Court denied leave to appeal, *see* App. 6, thus disposing of all claims in state level courts. Accordingly, Zantop now files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to provide much needed guidance to state courts in general, and to courts of the State of Michigan in particular, whose decisions

with respect to this area of taxation on interstate commerce remain stubbornly in conflict with well-settled decisions of this Court. The steadfast refusal of Michigan courts to recognize the unconstitutionality of this part of the Michigan Use Tax Act should not be surprising because Michigan revenue is at stake. This is the latest in a long line of aggressive taxation practices, carried out by the State's Department of Treasury and condoned by its courts. Where, as here, those within a system have no incentive to change the system (and in fact have every incentive not to), change must come from outside that system. Zantop respectfully requests that this Court make that change, and restore constitutional decorum to the State's taxation practices.

I. THE STATE OF MICHIGAN HAS VIOLATED THE COMMERCE CLAUSE BY ASSESSING "USE" TAXES ON AIRCRAFT PARTS THAT WERE NOT USED IN-STATE.

The Michigan Use Tax Act exempts from taxation "[p]roperty, the storage, use, or other consumption of which, this state is prohibited from taxing under the constitution or laws of the United States, or under the constitution of this state." Mich. Comp. Laws § 205.94(1)(b).[1] In this case, imposition of a use tax on the aircraft parts Zantop sends out-of-state for repair violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Violations of the Commerce Clause based on taxation of interstate commerce are measured under this Court's well-

---

[1] During the taxable period at issue, this provision was codified as Mich. Comp. Laws § 205.94(b). While the designation has changed, the text remains identical.

established *Complete Auto Transit* Test, *supra*. In order to pass constitutional muster, a state tax must meet all four prongs of the Test: (1) the tax must be applied to an activity with a substantial nexus with the taxing state, (2) the tax must be fairly apportioned, (3) the tax may not discriminate against interstate commerce, and (4) the tax must be fairly related to services provided by the state. *Complete Auto Transit, supra*. Here, not only is the tax unable to meet *all* of these prongs, it is unable to meet *any* of them. Because the tax fails all four prongs of the *Complete Auto Transit* Test, the Constitution of the United States prohibits the State from assessing Zantop for the "storage," "use," or "consumption" of the parts at issue.

A. The Parts Have No Substantial Nexus With The State Because They Are Merely Components Of Aircraft Whose Presence In-State Is, At Best, *De Minimis*.

In order for a tax to be constitutional, the activity it seeks to tax must have a "substantial nexus" with the taxing state; here, no such nexus exists between Zantop's periodic repair of its aircraft parts and the State of Michigan. Simply put, the "activity" being taxed is, at most, *de minimis*, but is in no case "substantial." Zantop's aircraft, and hence its aircraft parts, spend only 4/100 of one per cent of their flight hours, and only 2/100 of one per cent of their flight miles in the State of Michigan.

This would not be good enough for Ivory soap, and it certainly is not good enough for the United States Constitution. It is simply impossible, in good conscience, to claim that such a miniscule percentage is "substantial," let alone that it provides the State with the constitutional right to tax the parts at full value, and, indeed, the courts

below went out of their way to avoid making such a disingenuous claim.

The Michigan courts completely mishandled the critical issue of whether Zantop's procurement of repaired or replaced parts had a "substantial nexus" with Michigan, and instead replaced this constitutionally required standard with an *ad hoc* standard for whether this procurement constituted a "use" under a Michigan statute. Both the Court of Claims and the Court of Appeals correctly identified the *Complete Auto Transit* Test as controlling their analysis. *See* Court of Claims Op. at 6, App. 12-13; Court of Appeals Op. at 2, App. 3. Both the Court of Claims and the Court of Appeals also correctly inquired (but incorrectly answered) whether the tax at issue was fairly apportioned, non-discriminatory, and fairly related to state services. *See* Court of Claims Op. at 7-9, App. 13-14; Court of Appeals Op. at 2-3, App. 3-4. And, inexplicably, both the Court of Claims and the Court of Appeals *completely failed to address* whether the activity at issue had a substantial nexus with the State. *See* Court of Claims Op. at 6, App. 14-15; Court of Appeals Op. at 2, App. 4-5. Rather than address, as the Constitution requires, whether the activity had such a substantial nexus, the Court of Claims and the Court of Appeals essentially replaced the first prong of the *Complete Auto Transit* Test with the test for whether an activity constitutes a "use" under Michigan law.

The courts below held that the activity in question "is the use . . . of the parts," but did not examine, as they were required to, whether this use was substantial. Court of Claims, Op. at 7, App. 13 ("The activity in this matter being taxed is the use . . . of the aircraft parts"); Court of Appeals, Op. at 2, App. 4 ("The activity in question is the

use of the parts."). Both courts analyzed whether Zantop's acquisition of repaired or replaced parts was a "use" under the state law,[2] and both pointed to an "identifiable" exchange of services within Michigan borders as establishing, ostensibly, a "use" sufficient to meet the substantial nexus test, but neither examined the extent of that "use."[3] Just because something is "identifiable" does not mean it is "substantial."

Indeed, even if the courts below were somehow not flagrantly disregarding this Court's Commerce Clause jurisprudence in focusing on whether a "use" was "identifiable," the courts below "identified" the wrong "use" for purposes of taxable activity. The courts below held that "it is the plane not the parts that are in interstate commerce for purposes of this case." Court of Claims Op. at 7, App. 13. This, of course, is gibberish. An airplane consists of its constituent parts. The parts are coterminous with the plane; to the extent one travels in interstate commerce, so does the other. Wrenching some difference of alleged constitutional significance from this

---

[2] Under Michigan law, " 'Use' means the exercise of any right or power over tangible personal property incident to the ownership of that property including transfer thereof in any transaction where possession is given." Mich. Comp. Laws § 205.92, App. 46-47.

[3] *See* Court of Appeals, Op. at 2, App. 3-4:

> As the Court of Claims observed, plaintiff seeks to focus on the interstate character of the planes in which the parts were installed, rather than the installation of the parts themselves. The activity in question is the use of the parts. Where the parts are shipped to Michigan and installed in Michigan, there is a discrete and identifiable use of the parts in Michigan that has a substantial nexus with the state.

logical fallacy, the courts below went on to imply that somehow the installation of the parts themselves, no matter how quickly that occurs and no matter how little time those parts actually spend in Michigan, constitutes a substantial nexus with the State. Although this case might be different if Zantop had been providing a repair service to another air carrier, and acquired the parts for purposes of making such repairs, Zantop is *not* in the business of repairing airplanes for others in Michigan. Rather, it operates an air freight airline, and to the extent it "uses" parts, it uses them only as that – parts of the aircraft it uses to fly cargo to and from destinations almost entirely outside the State of Michigan and in the stream of interstate commerce.

Although the parts are installed immediately onto Zantop's planes, and although those planes (and, *per force*, their parts) spend nearly all of their time outside the State of Michigan, the State nonetheless taxes those parts at full value. Because this tax is levied upon an activity not having substantial nexus with the state, it is unconstitutional under the first prong of the *Complete Auto Transit* Test. In fact, this gross disparity also forces the conclusion that the use tax at issue is not fairly apportioned and is, therefore, likewise unconstitutional under the second prong of the *Complete Auto Transit* Test.

B. The "Use" Tax Is Not Fairly Apportioned Because The State Collects 100 Per Cent Of The Taxes For Parts That Spend Almost 100 Per Cent Of Their Time Out-Of-State.

The fair apportionment requirement exists to "ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 261 (1988).

Here, Michigan is receiving a 100 per cent share of taxes for parts that spend nearly 100 per cent of the time outside Michigan. This clearly violates the fair apportionment prong of the *Complete Auto Transit* Test, and subsequent decisions, which require a tax to be both internally and externally consistent. *See Trinova Corp. v. Dept. of Treasury*, 498 U.S. 358 (1991). The use tax at issue here is neither internally nor externally consistent.

1. The State's "Use" Tax Is Not Internally Consistent, And Therefore Is Not Fairly Apportioned.

A tax is internally consistent if it is structured so that if every state were to impose an identical tax, no multiple taxation would result. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). To demonstrate a lack of internal consistency, a taxpayer need not prove that specific interstate transactions were, in fact, subjected to multiple taxation. *See, e.g., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 247 (1987); *Central R.R. Co. v. Pennsylvania*, 370 U.S. 607, 614 (1962). Instead, the mere existence of a *possibility* that imposition of an identical tax would result in multiple taxation supports a determination that a tax is internally inconsistent. *See id.*

The use tax at issue here is not internally consistent because it fails to fully avoid the threat of the multiple taxation that would arise if every state taxed Zantop the way Michigan has. Assuming that the other 49 states adopted taxing statutes identical to Michigan's Use Tax Act, multiple taxation could occur with respect to each state's individualized interpretation of what "use," "storage" or "consumption" of the parts is properly subject to

taxation. For example, while Michigan asserts that it can assess use tax upon the *entire purchase price* of the parts because the parts were installed in Michigan, another state might decide through its interpretation of an identically-worded statute that it, too, can assess a use tax on the *entire purchase price* of the parts because of a different activity (*e.g.*, the airplane is hangared in that state or spends proportionately more time there).

The Court of Appeals below incorrectly held that Michigan's Use Tax Act was internally consistent because of the presence of a "credit provision" in the Act. Although a *properly* worded credit provision within a tax enactment *might* alleviate the threat of burdensome multiple taxation, *see Goldberg, supra,* the provision at issue here does not do so because the credit it provides is conditional. That provision grants an exemption from use tax only for:

> Property the sale or use of which was *already subjected* to a sales tax or use tax equal to, or in excess of, that imposed by this act under the law of any other state or a local governmental unit within a state *if the tax was due and paid on the retail sale* to the consumer *and the state or local governmental unit within a state in which the tax was imposed accords like or complete exemption* on property the sale or use of which was subjected to the sales or use tax of this state. . . .

Mich. Comp. Laws § 205.94(1)(e) (emphasis added).[4] Thus, in order to avoid multiple taxation, the other state taxes must be: (1) already paid, (2) due on the retail sale

---

[4] This provision was designated Mich. Comp. Laws § 205.94(e) instead of § 205.94(1)(e) during the taxable period at issue, but the text of the provision itself remains unchanged.

to the consumer, and (3) imposed by a governmental entity with a similar reciprocal credit provision.

In short, with all of these hurdles, Michigan's credit provision cannot eliminate the possibility of multiple taxation. A use tax imposed by another state would most likely be imposed *after* Michigan's imposition of use tax, thereby causing the first condition of Michigan's credit provision to fail. Moreover, a use tax previously or subsequently imposed by another state would *never* receive credit under this provision because the second condition of Michigan's credit provision could not be met. The parts at issue here were simply not involved in a retail sale to the consumer, thus making the other tax fail to meet the second condition of Michigan's credit provision. An example will illustrate the flaw in the statute. Assume the state of Arkansas decides to impose a use tax upon Zantop's use of the parts when flying the aircraft into and out of that state. The Arkansas use tax would be subsequent, and not previous, to the Michigan tax, so the Arkansas tax could not be "already" paid. Likewise, it would not be due "on the retail sale" to Zantop, the consumer, because the Arkansas tax would not have been imposed on the retail sale. Instead, it would have been imposed on the use of the parts in an instrumentality of interstate commerce that comes into contact with the State of Arkansas. Because Michigan would still impose its use tax in addition to the use tax imposed by Arkansas, the credit provision championed by the courts below fails to save the Michigan tax from internal inconsistency, and therefore fails to save it from unconstitutionality.

2. The State's "Use" Tax Is Likewise Not Externally Consistent, And Is Also Therefore Not Fairly Apportioned.

A corollary to the internal consistency requirement, the external consistency requirement demands that the state tax only that portion of the interstate activity that reasonably correlates to the in-state component of the activity being taxed. *Goldberg, supra.* The use tax at issue here fails the external consistency test because, considering the predominant out-of-state character of Zantop's parts and planes, it is readily apparent that the Department does not seek to tax only the in-state component of the use of the parts. Instead, the use tax assessed to Zantop represents an exaction measured by the *full purchase price* of the parts, including both the in-state and out-of-state components of use. Indeed, Zantop, an international airline purchasing the parts for use almost solely in interstate commerce, pays the same quantum of use tax as the Department would demand from a business that acquires parts for use solely in Michigan. In sum then, Michigan unlawfully seeks to tax the entire use of property when that use occurs only minimally within the state, *and then solely as an adjunct to an activity in interstate commerce.* Such a situation is irrational and unconstitutional and must no longer be endorsed by the Michigan courts.

The courts below incorrectly focused entirely on Zantop's installation of the parts in Michigan, and found that this installation satisfied the external consistency test. In essence, the courts below relied on a kind of constitutional alchemy, by which the parts lose their interstate character simply because they are in Michigan for the

briefest of moments before being immediately re-incorporated into Zantop's aircraft and returned to their overwhelmingly out-of-state usage. And that is the key: the usage at issue is not the *installation* of the parts for the brief time the planes are on the ground in Michigan, it is the continuous out-of-state *operation* of the flights themselves made possible through those parts. The parts themselves are overhauled solely in order to comply with federally mandated regulations that enable Zantop to return to its entire reason for being – the interstate and international transport of air cargo.

Moreover, substantial support exists for the proposition that, if any tax is to be imposed in use tax cases involving physical movement of large objects over identifiable routes where it is feasible to account for distance, external consistency standards require exaction of a tax measured by some fairly applied apportionment formula. As this Court has noted:

> It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. In previous cases we have endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State.

Goldberg, supra at 264 (internal citations omitted).[5] The *Goldberg* case itself declined to find a Commerce Clause

---

[5] Although a recent case decided by this Court might superficially be read to limit this proposition, the proposition itself remains valid. In *Oklahoma Tax Comm. v. Jefferson Lines, Inc.*, 514 U.S. 175, 180-83 (1995), this Court upheld the

violation where a state taxed interstate telecommunications on a flat rate instead of apportioning the rate based on the number of miles the electronic signals traveled within the state as a portion of the total miles such signals traveled. *Id.* at 260. The Court failed to find a Commerce Clause violation, in large measure, because the electronic signals at issue in that case were so different from the large physical objects with identifiable routes involved in the prior cases.

For cases in which large physical objects are moving over identifiable routes, making it possible to account for the distance actually traveled within the state, fair apportionment requires that a state make such an accounting and that it apportion its tax accordingly. *See Goldberg, supra; see also Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (prohibiting the State of New York from taxing 100% of the receipts for transportation between two points in New York when 43% of the transportation mileage occurred in New Jersey and Pennsylvania); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954)

---

imposition of an unapportioned *sales* tax on bus tickets sold in Oklahoma for interstate travel. There, the Court found a sufficient safeguard against the risk of impermissible multiple taxation of a sale because a sale is consummated in only one state. Here, the State of Michigan does not seek to impose a *sales tax* for a transaction taking place in the State of Michigan but rather seeks to impose a "use" tax based on the purported use, storage or consumption of property within the State of Michigan. Where, as here, the sale takes place outside the State of Michigan and, thereafter, in the course of the interstate nature of business operations, some use or consumption allegedly occurs in the State, with the use tax being imposed on the *full value* of the parts so "used," the law cannot be said to satisfy the internal and external consistency requirements of the *Complete Auto Transit* Test.

(finding unconstitutional a tax based on the total volume of gas taken, where the taking was inextricably intertwined with interstate commerce and the assessment of the taking could result in multiple taxation); *Fargo v. Michigan*, 121 U.S. 230 (1887) (striking down a Michigan law taxing railroad freight at full value instead of apportioning the tax based on the distance traveled within the State of Michigan).

The present case is firmly in line with the teachings of *Goldberg* and its predecessors – it deals with "the movement of large physical objects over identifiable routes, where it [is] practicable to keep track of the distance actually traveled within the taxing State." *Goldberg, supra* at 264. The aircraft at issue here are no different than the buses at issue in *Central Greyhound* – both are large physical objects moving in identifiable routes. Moreover, here, as in *Central Greyhound*, it is practicable to keep track of the distance actually traveled within the taxing state. Indeed, not only has the State of Michigan stipulated to the number of miles Zantop's planes and parts spend in the State, it has stipulated to amount of time that those planes and parts spend in the State. *See* App. 61-63. Under any measure, then, be it time or distance, the State can determine the percentage of alleged use of the parts that occurs within its borders. Because it can do so, it must do so, and because it has not done so, the tax at issue is unfairly apportioned and unquestionably unconstitutional.

C. The "Use" Tax Discriminates Against Interstate Commerce Because It Prevents Interstate Businesses From Freely Entering The State's Marketplace.

Perhaps the most basic prong of the *Complete Auto Transit* Test, the Test's prohibition on discrimination requires just that – a state may not discriminate against interstate commerce. The discrimination need not be blatant. State taxes are unconstitutional if "though nondiscriminatory on their face," they "impose economic burdens on interstate enterprises that are not in fact imposed on local competitors." Lawrence H. Tribe, *American Constitutional Law* § 6-16 (3d ed. 2000). This principle is particularly apparent where, as here, a state prevents interstate businesses from coming into the state because of the ramifications of its unconstitutional tax policy.

In this case, the State of Michigan is discriminating against interstate commerce by building a wall of economic isolationism that prevents interstate businesses from entering Michigan and competing with its native businesses. For example, suppose that Michigan's neighboring states offer an exemption for the activity on which Michigan has taxed Zantop. Suppose further that several interstate air freight carriers are contemplating where to build facilities from which they will fly their aircraft and make the federally mandated repairs using parts acquired out-of-state. In such a case, the interstate air freight carriers would likely build facilities in any state other than Michigan because only Michigan would deny them a tax exemption – a tax exemption that is constitutionally required given the ephemeral connection between the parts at issue and the taxing state.

In effect, Michigan's tax policy forecloses interstate businesses from making "tax neutral decisions," and therefore unconstitutionally discriminates against interstate commerce. *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318, 331 (1977). Similarly, in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), this Court struck down a state tax credit for domestic international sales corporations based on how substantial their in-state shipping activities were. Where a tax policy has the forbidden effect of "foreclosing tax neutral decisions," it is unconstitutional. *Id.* at 406. Here, Michigan is preventing interstate businesses from making a tax neutral decision about where to locate. The end result is economic Balkanization, in which interstate businesses avoid Michigan and seek harbor by locating in its neighboring states.

Under this Court's well-settled jurisprudence, this type of economic Balkanization is constitutionally impermissible. The purpose of the Commerce Clause is "preventing a state from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole." *Jefferson Lines, Inc., supra* note 5 at 180. In essence, then, the Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for the calling of the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid . . . tendencies toward economic Balkanization . . . " *Id.* (quoting *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 7 (1986). By putting up a wall through its use tax policies that other states in the Union do not, Michigan is encouraging the very economic Balkanization the Commerce Clause was designed to avoid. As such, the State's discriminatory tax policy stands in direct violation of the Commerce Clause and must be struck down.

D. The State's Imposition Of A "Use" Tax Is Not Fairly Related To The Services It Provides Because The State Provides No Services Whatsoever With Respect To These Parts.

Finally, under the fourth prong of the *Complete Auto Transit* Test, the tax at issue is unconstitutional because it is not fairly related to services provided by the State of Michigan. While the services provided by a state need not measure directly up to the taxable activity in order to be "fairly related," *there must be at least some services provided.* Here, Michigan provides no services with respect to the aircraft or the parts. The payment of use tax based on the full purchase price of the parts fails to reflect the reality that the parts are used in interstate commerce and spend all of their useful lives outside the state of Michigan.

The courts below said that Zantop receives services from the State fairly related to the taxation on its parts, but neither court even attempted to support this statement. They did not – and could not – identify any benefits Zantop receives from the State, let alone benefits that bear a fair relation to the full taxation of the interstate parts at issue here. The courts below attempted to claim that the tax was "fairly related" to services provided by the State of Michigan because Zantop operates a "substantial repair facility" in Michigan. Court of Claims Op. at 8-9, App. 15, Court of Appeals Op. at 3, App. 4. In fact, Zantop operates no such facility and no such facility is apparent in the record. At best, the record merely reflects that Zantop has a facility in Michigan where "major aircraft repair" is conducted. Partial Stipulation, ¶ 13, App. 59. Even assuming that this facility is "substantial," as the courts below claim, this does nothing to support the conclusion that there is a fair relation between services

provided by the State and the taxable activity targeted by the State. This is because the activity being taxed is *not* the operation of a repair facility but rather the alleged use in Michigan of the rotable parts of Zantop's aircraft. This alleged use is, in turn, the furthest thing from "substantial." The dubious connection between this supposedly taxable activity and the hypothetical services provided by the State is insufficient to withstand constitutional scrutiny. Thus, under the fourth prong of the *Complete Auto Transit* Test, as under the previous three prongs, the State of Michigan is in violation of the Commerce Clause of the United States Constitution. It is no less in violation of the Equal Protection Clause of the United States Constitution's Fourteenth Amendment.

II. BECAUSE IT RESTS ENTIRELY ON ARBITRARY AND IRRATIONAL DISTINCTIONS BETWEEN SIMILARLY SITUATED TAXPAYERS, THE STATE'S PRACTICE OF ASSESSING "USE" TAX ON SOME TYPES OF COMMERCIAL CARRIERS BUT NOT OTHERS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The crux of Zantop's Equal Protection challenge is that the State of Michigan taxes some types of commercial freight carriers but not other types. Although states are free to make distinctions in their systems of taxation – provided those distinctions are rational – in this case, there is no rational basis for the distinction the State of Michigan makes. Specifically, during the taxable period at issue, Michigan's Use Tax Act granted exemptions on taxation for vessels "designed for commercial use of registered tonnage of 500 tons or more . . . and repairs for the

exclusive use of a vessel . . . engaged in interstate commerce." Use Tax Act § 4(j), Mich. Comp. Laws § 205.94(j), App. 52.[6] A similar exemption applied to "[t]he storage, use, or consumption of any aircraft owned or used by a domestic passenger air carrier . . . if the aircraft is used primarily in the regularly-scheduled commercial transport of passengers." Use Tax Act § 4(x), Mich. Comp. Laws § 205.94(x), App. 52-53. Similarly, in Michigan Department of Treasury Letter Ruling 89-48, the Department made clear that it would also recognize an exemption for rolling stock purchased outside of Michigan which is then placed in the stream of interstate commerce, until such time as the rolling stock is converted to an intrastate application. *See* Letter Ruling 89-48, App. 54-55. During the taxable period at issue, no such exemption applied to commercial air freight carriers like Zantop.

The presence of an exemption for one type of freight carrier and the absence of such an exemption for another type is entirely arbitrary and fails the rational basis test for measuring violations of the Equal Protection Clause. Under the rational basis test, a law that "neither burdens a fundamental right nor targets a suspect class," will be upheld provided it "bears a rational relation to some

---

[6] This provision was designated Mich. Comp. Laws § 205.94(k) instead of § 205.94(j) during the taxable period at issue, but the text of the provision itself remains largely unchanged. The only difference between the prior and present iterations is that, during the taxable period at issue, the text provided exemptions for vessels "*when* produced upon special order of the purchaser," and the text now provides such exemptions "*if* produced upon special order of the purchaser." *Id.* (emphasis added)

legitimate end." *Romer v. Evans*, 517 U.S. 620 (1996). While this test is deferential, it nonetheless requires that the State disclose *some* identifiable interest served by its regulation. *See Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529 (1959).

In this case, the State has identified no such interest, because no such interest is available to be identified. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm. of Webster County*, 488 U.S. 336 (1989) (finding an Equal Protection violation where the government handles assessments for real properties that had recently been sold in a different manner than assessments for properties that had not changed hands); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim at the legislature, its impartiality would be suspect."). Even assuming that some legitimate interest were identified, the State's tax assessment practices must bear a rational relation to it, and here no such relation exists because the distinctions on which the State relies are completely arbitrary.

Where a state taxation scheme makes "arbitrary distinctions," it violates the Equal Protection Clause. *Williams, supra* at 22. The *Williams* decision struck down a use tax assessed upon recently arrived residents of Vermont who registered motor vehicles purchased outside of Vermont for which a sales tax had been paid at the time of acquisition. According to the *Williams* Court, "[t]o free one group and not the other from the otherwise applicable tax burden violates the Equal Protection Clause." *Id.* at 27. Where, as here, "[d]iscriminations of an unusual character" exist, they "especially suggest careful consideration to determine whether they are obnoxious" to

Equal Protection guarantees. *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928).

Under any measure, the State's discriminatory use tax practices are arbitrary and irrational. The only difference between a freight carrier like Zantop, which receives no exemption from use tax, and other freight carriers who do, is the mode of transportation. Carriers who transport by water or land are exempted from use tax, while carriers who transport by air are not, and even then air carriers who transport passengers instead of or along with freight still receive favorable use tax treatment. Finding a difference of constitutional significance eluded the Court of Claims, which was "strained to understand the difference afforded these [different] modes of interstate commerce that warrant one form to receive use tax relief with respect 'provisions, supplies, maintenance, and repairs' while the other is not." Court of Claims Op. at 5, App. 31. Indeed, as the dissent in the Court of Appeals noted, "in this taxation scheme, the rational basis test gives way to Orwellian analysis, wherein all of the similarly situated are equal, but some of the similarly situated are more equal than others." App. 22.

An appropriate constitutional distinction is elusive because it is impossible. This Court recognized this futility in a similar context in its 1931 decision in *Smith v. Cahoon*, 283 U.S. 553 (1931). In *Smith*, the Court struck down, on Equal Protection grounds, a regulation exempting transportation carriers hauling certain types of products from a bonding requirement but imposing the requirement on other carriers. As the *Smith* Court put it, "in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk

or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities." *Id.* at 566-567. The *Smith* Court concluded that "the [regulatory] discrimination . . . between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' " *Id.* The present case is no different than the *Smith* case. Instead of arbitrary distinctions based on the cargo hauled by motor vehicles at issue in the *Smith* case, in the present case we are confronted with arbitrary distinctions based on the cargo hauled by aircraft. The arbitrariness of this distinction begs for an explanation, but no sufficient explanation is forthcoming.

Because the Michigan Legislature provided no justification for the exemption at issue in this case, the Michigan courts have had to fabricate a *post hoc* rationalization; unfortunately, this rationalization prompts as many questions as it provides answers. The only rationale the Michigan Court of Appeals offered was that the Michigan Legislature might have decided to exempt parts for certain carriers but not others because of its "desire to promote that industry to locate in Michigan." This proposition finds support in the legislative history for another part of the Michigan Use Tax Act, but unfortunately for the State, that support merely strengthens Zantop's claim of unconstitutional discrimination. It seems that, in large part, commercial air passenger carriers are exempted from use tax, while their counterpart commercial air freight carriers are not, because a passenger air carrier

was able to mount a successful lobbying effort in the Michigan Legislature, benefiting its business while putting businesses like Zantop at a competitive disadvantage. The legislative history behind the use tax exemption for passenger air carriers shows that this provision was unabashedly designed to benefit a single former Michigan airline company. *See* House Legislative Analysis Section, First Analysis to House Bill 5801 (Nov. 20, 1994), App. 64-65. While this may go a long way in explaining the distinction between passenger air carriers and freight air carriers in a practical sense, it does nothing to justify the distinction in a constitutional sense. Indeed, it goes quite a long way in the opposite direction – it confirms that the Legislature intended to codify an arbitrary distinction. The only basis for this distinction was admitted discrimination against one class of participant in interstate commerce in favor of another. Where the only basis for a distinction is discrimination, the distinction itself is unconstitutional.

In the end, while the State is free to structure its own tax system to encourage intrastate commerce, that freedom ends where discrimination against interstate commerce begins. The State of Michigan's discriminatory use tax practices have created a competitive disadvantage for some, but not all, similarly situated carriers in interstate commerce. This is not *per se* unconstitutional, and the State may even go so far as to subject similarly situated taxpayers to outright unequal treatment, but while it needs only a rational reason for treating them on a unequal basis, it needs at least *a reason*. Here, there is none. The State's arbitrary discrimination among similarly situated taxpayers clearly violates the Equal Protection Clause, which is meant to prevent "governmental

decision-makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1 (1992), citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Unless this Court acts now, Zantop, and all other similarly situated commercial freight carriers in Michigan, will suffer a competitive disadvantage in their businesses – a competitive disadvantage that may, ultimately, prevent them from operating their businesses at all.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PATRICK R. VAN TIFLIN
Counsel of Record
BRIGHAM COOK SMITH
HONIGMAN MILLER SCHWARTZ AND COHN LLP
The Phoenix Building
222 Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282

APPENDIX

STATE OF MICHIGAN

COURT OF APPEALS

ZANTOP INTERNATIONAL AIRLINES, INC., Plaintiff-Appellant, v DEPARTMENT OF TREASURY, Defendant-Appellee.	UNPUBLISHED April 24 2001 No. 217513 Court of Claims LC No. 91-013365-CM

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the Court of Claims' order granting defendant summary disposition in this use tax dispute. We affirm.

Plaintiff brought this action seeking a refund of use taxes paid under protest on parts that were delivered in Michigan and installed on planes used in interstate commerce. The Court of Claims granted summary disposition to defendant, finding that the parts were used or stored in Michigan, and the imposition of the tax did not violate the Commerce Clause.

The use tax is complementary to the sales tax and is designed to cover those transactions not covered by the General Sales Tax Act, MCL 205.51 *et seq.;* MSA 7.551(1) *et seq. Honeywell, Inc v Dep't of Treasury,* 167 Mich App 446;

423 NW2d 223 (1988). The Use Tax Act provides in pertinent part:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state. . . . For the purpose of the proper administration of this act and to prevent the evasion of the tax, it is presumed that tangible personal property purchased shall be subject to the tax if brought into the state within 90 days of the purchase date and is considered as acquired for storage, use, or other consumption in this state. [MCL 205.93(1); MSA 7.555(3)(1)].

The terms use and storage are defined in § 2 of the act:

> (b) 'Use' means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given.
>
> (c) 'Storage' means a keeping or retention in this state for any purpose after losing its interstate character. [MCL 205.92; MSA 7.555(2)].

Where items are brought into the state within ninety days of purchase, it is presumed that they are subject to the use tax, *Kellogg Co v Dept of Treasury*, 204 Mich App 489, 493; 516 NW2d 108 (1994), and the taxpayer has the burden of overcoming the presumption of taxation, or showing that an exemption applies. *Id.*

Initially, we observe that we are in agreement with defendant that plaintiff is barred from relitigating the issue whether the parts were "used" within the meaning

of the act. This issue was decided adversely to plaintiff in prior litigation involving virtually identical facts. While plaintiff argues that it has tightened up its "just in time" scheduling so that the parts are installed as quickly as possible upon arrival, this change would apply to the "storage" issue, rather than the "use" issue.

Moreover, we agree with defendant that the Court of Claims was correct in its conclusion that the parts were used in Michigan. For the purpose of the statute, the parts were used when plaintiff exercised its right and power over them by taking possession of them and installing them in plaintiff's planes. This occurred in Michigan.

The question, then, is whether taxation under the act violates the Commerce Clause of the United States Constitution, art I, § 8, cl 3. A taxpayer is exempt from the use tax if the imposition of the tax would violate the Commerce Clause, which forbids the burdening through taxation of interstate commerce. MCL 205.94(b); MSA 7.555(4)(b). The four-part test of *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977), has replaced the taxable moment test for purposes of constitutional analysis. *Kellogg, supra* at 494. The four factors are: (1) the activity taxed must have a substantial nexus to the taxing state; (2) the tax must be fairly apportioned; (3) it may not discriminate against interstate commerce; and (4) it must be fairly related to services provided by the state. *Id.* at 495.

As the Court of Claims observed, plaintiff seeks to focus on the interstate character of the planes in which the parts were installed, rather than the installation of the

parts themselves. The activity in question is the use of the parts. Where the parts are shipped to Michigan and installed in Michigan, there is a discrete and identifiable use of the parts in Michigan that has a substantial nexus with the state.

A tax is not unfairly apportioned where it is internally and externally consistent. *Goldberg v Sweet*, 488 US 252; 109 S Ct 582; 102 L Ed 2d 607 (1988). A tax is internally consistent if structured so that if every state were to impose an identical tax, no multiple taxation would result. *Id.* at 260. Here, if every other state had an identical act, no other state would impose the use tax because the parts were installed (used) in Michigan alone. The only other state that had a relationship to the parts did not collect a sales tax, and if it had, the act would have afforded plaintiff a credit. MCL 205.94(e); MSA 7.555(4)(e). A tax is externally consistent if it taxes only revenue that reasonably reflects the in-state component of the activity being taxed. *Goldberg, supra* at 262. Here, the tax is only imposed on the parts delivered and installed or stored in Michigan. No interstate activity is taxed.

Plaintiff does not contest the third factor. The use tax applies equally to intrastate and interstate commerce and does not discriminate against interstate commerce. The fourth factor focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the activity at issue. *Goldberg, supra* at 266. Plaintiff operates a substantial repair facility at Willow Run airport. It receives benefits from services provided by the state, satisfying the fourth requirement of the test. The trial court did not err in its application of the four-part *Complete Auto* test.

Plaintiff further asserts that notwithstanding *Complete Auto, supra,* and *Kellogg, supra,* the "taxable moment" test still applies in determining whether the statutory nexus is satisfied. Assuming this test is still viable as a matter of state law, we are satisfied that the test is satisfied. The parts came to rest in Michigan where their interstate journey as parts came to an end. They were then used by plaintiff when they were installed in plaintiff's aircraft in Michigan. Thereafter, they became part of the aircraft, the taxation of which is not at issue. We do not agree that defendant's levy of the use tax on the use of the new parts in Michigan through their installation in the aircraft is the equivalent of taxing the aircraft. The parts were separate from the aircraft until plaintiff used them by installing them in the aircraft. The Court of Claims did not err in granting summary disposition to defendant.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White

Michigan Supreme Court
Lansing, Michigan

[Name Omitted In Printing]

Order

Entered: November 30, 2001

119238

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 119238
COA: 217513
Court of Claims:
91-013365-CM

On order of the Court, the delayed application for leave to appeal from the April 24, 2001 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

dmb: 1127

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 30, 2001

/s/ Corbin P. Davis

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ZANTOP INTERNATIONAL AIRLINES INC.,

Plaintiff,

v

MICHIGAN DEPARTMENT OF TREASURY, REVENUE DIVISION,

Defendant.
_____/

File No. 91-13365-CM
Hon. Thomas L. Brown
Opinion and Order

This matter is before the Court on Plaintiff Zantop International Airline's, Inc. (Zantop), a Michigan corporation, motion for Summary Disposition pursuant MCR 2.116(C)(10). Zantop alleges that Defendant Michigan Department of Treasury (Department) wrongfully taxed aircraft parts purchased from out of state vendors pursuant to the Michigan Use Tax MCL 205.93; MSA 7.555(3). The aircraft parts were installed on Zantop's planes while grounded in Ypsilanti, Michigan at Willow Run Airport. In turn, the Department asks this Court to grant Summary Disposition in its favor pursuant to MCR 2.116(I)(2).

STATEMENT OF FACTS

Zantop is a Michigan corporation in the business of transporting air cargo in interstate commerce. Zantop

flies to 40-50 airports. One of Zantop's two repair facilities is based at Willow Run Airport in Michigan.

This case is the result of Zantop being taxed by the Michigan Department of Treasury on parts purchased out of state and installed in Zantop planes hangered in Michigan between October 1, 1986 and March 11, 1991. However, this Court notes that in *Zantop International Airlines Inc* v *Michigan Dep't of Treasury*, (Docket No. 95728, December 15, 1997) the Michigan Tax Tribunal determined that Zantop was liable for use tax on parts purchased between April 1, 1980 and March 31, 1983. In support of its decision to apply a use tax, Hearing Officer James R. Neuman stated on page 7 of his Proposed Judgement that:

> The parts are stored, used or consumed, for purpose of the Michigan use tax, when they are delivered in Michigan for the purpose of being installed in the aircraft. They have reached their final destination prior to installation. They are no longer in interstate commerce. The aircrafts are in interstate commerce. If the parts were to continue on to some other destination for sale, then they would be continuing in interstate commerce.

Finally, the Hearing Officer concluded on page 8 of his Proposed Judgment that a taxable moment or event occurs when the parts reach their destination prior to installation.

Because of the Hearing Officer's determination that use tax is applicable to parts purchased out of state and installed in Michigan, Zantop asks this Court to determination [sic] whether the use tax is applicable where out

of state parts are immediately installed in aircrafts which are flown predominantly outside the State of Michigan.

ANALYSIS

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a legal claim. *Ashworth* v *Jefferson Screw*, 176 Mich App 737, 741; 440 NW2d 101 (1989). The moving party must establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. In so ruling, the trial court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the party opposing the motion. *Quinto* v *Cross & Peters*, 451 Mich 358, 362; 547 NW2d 317 (1996). In granting a motion for summary disposition, a court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency as to an essential element which cannot be overcome. *Rizzo* v *Kretschmer*, 389 Mich 363, 371-72; 207 NW2d 316 (1973).

Under MCR 2.116(I)(1), a court may order summary disposition if the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue as to any material fact. Further, if it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2). *See Residential Ratepayer Consortium* v *Public Service Commission*, 168 Mich App 476, 480; 425 NW2d 98 (1987).

Resolution of this appeal requires application of the pertinent provisions of the Use Tax Act prior to amendment which took effect January 1, 1984. Specifically, MCL 205.93; MSA 7.555(3) of the Use Tax Act provides:

> (1) There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing or consuming tangible personal property in this state, which tax shall be equal to 4% of the price of such property, or services specified in section 3a, and to such tax there shall be added penalties and interest where applicable as hereinafter provided. For the purpose of the proper administration of this act and to prevent the evasion of the tax, it shall be presumed that tangible personal property purchased shall be subject to the tax if brought into the state within 90 days of the purchase date and shall be considered as acquired for storage, use or other consumption in this state.

A use tax is a tax on the privilege of using, storing and consuming tangible property brought from out of state after it has come to rest. *Honeywell Inc* v *Dep't of Treasury*, 167 Mich App 446; 423 NW2d 223 (1988). The intent of the tax is to reach purchases by consumers not reached by the Sales Tax Act. *National Bank of Detroit* v *Dep't of Revenue*, 334 Mich 132; 54 NW2d 278 (1952). Further, since the use tax does not apply to the operations of interstate commerce, but rather applies to the privilege of using tangible personal property after commerce has come to rest in this state, the power of Congress to regulate interstate commerce is not transgressed by the Use Tax Act. *Banner Laundering Co* v *State Board of Tax Administration*, 297 Mich 419; 298 NW 73 (1941).

This case involves aircraft parts which were first purchased out of state. Next, those parts where [sic] transported to Michigan. While in Michigan, the part's final destination, the parts were installed by Zantop into its planes. Zantop does not dispute that the parts were brought into the State of Michigan within 90 days of purchase. Thus, it is presumed that the parts are subject to use tax. *Kellogg Co* v *Dep't of Treasury*, 204 Mich App 489; 516 NW2d 108 (1984). Zantop has the burden of overcoming the presumption of taxation, or establishing that an exemption applies. *Kress* v *Dep't of Revenue*, 326 Mich 15; 39 NW2d 235 (1949).

Necessary in determining whether Zantop can overcome the presumption of taxation are definitions of the terms of "use" and "storage". The terms are defined in § 2 of the act as follows:

> (b) "Use" means the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given.
>
> (c) "Storage" means a keeping or retention in this state for any purpose after losing its interstate character.

In this matter, Zantop exercised ownership rights over the aircraft parts when it installed the parts after they were shipped to Michigan. Although Zantop maintains that the aircraft rotable parts were immediately installed in Zantop's aircrafts and thus remained instrumentalities of interstate commerce, this Court finds that the parts came to rest in the State of Michigan. Since the

aircraft parts were no longer instrumentalities of interstate commerce, any keeping or retention of the parts in this state constitutes storage under the Use Tax Act. The Court also notes that the legislative intent behind the Use Tax Act was to reach tangible personal property that does not fall within the parameters of the state sales tax. If Zantop had purchased these items within the State of Michigan, the items would have been subject to the state sales tax. Clearly, Zantop maintains power over the aircraft parts, uses the parts within the State of Michigan, and stores the items, however minimal that storage time is alleged to be. The aircraft parts in question are the type of personal property contemplated by the Use Tax Act. Zantop has failed to overcome the presumption of taxation as provided for under the Act. *Master Craft Engineering Inc* v *Dep't of Treasury*, 141 Mich App 56; 366 NW2d 235 (1985).

Since Zantop has failed to overcome the presumption, it must establish that an exemption applies in order to avoid the use tax. MCL 205.94(b); MSA 7.555(2) states that use tax does not apply to "[p]roperty, the storage, use, or consumption of which this state is prohibited from taxing under the constitution or laws of the United States, or under the constitution of this state."

The Commerce Clause of the United States Constitution, US Const, art I, § 8 cl 3, forbids burdening interstate commerce through taxation. Thus, a tax that violates the Commerce Clause is void. The test used in Michigan for determining whether a state tax is constitutional was first set out by the United States Supreme Court in *Complete Auto Transit Inc* v *Brady*, 430 US 274; 97 S CT 1076; 51 L Ed 2d 326 (1977). The elements of the *Complete Auto* test are:

(1) the activity taxed must have a substantial nexus to the taxing state; (2) the tax must be fairly apportioned; (3) it may not discriminate against interstate commerce; and (4) it must be fairly related to services provided by the state.

First, the activity being taxed involves the installation of parts by Zantop on its planes. Zantop installs parts at one of two locations – either at its facility in Michigan or in Georgia. True, the parts were in interstate commerce, however, Zantop's assertion that the parts themselves are still in interstate commerce, after being installed, does not fly with this Court. After installation, it is the plane not the parts that are in interstate commerce for purposes of this case. The activity in this matter being taxed is the use and storage of the aircraft parts and not the interstate freight delivery. Thus, since the parts are shipped to Michigan and installed in Michigan, there is an identifiable exchange of services within the Michigan borders, which is sufficient to establish a substantial nexus with the State of Michigan. *Kellog, supra* at 495.

Second, Zantop argues that the use tax is not fairly apportioned to meet the requirements of the Commerce Clause. The fair apportionment test requires that the tax meet a two prong test – the internal and external consistency tests. *Goldberg* v *Sweet*, 488 US 252, 261; 109 S Ct 582; 102 L Ed 2d 21 (1988). To be internally consistent, a tax must be structured so that if every state imposed the same tax, multiple taxation would not arise. *Id.* In the case at hand, Michigan provides a credit for sales or use taxes paid to other states. MCL 205.94(e); MSA 7.555(4e). Thus if every state imposed the same tax, a credit would

be applied under the Michigan statute in those situations where multiple taxation arises.

The external consistency test inquires whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Goldberg*, 488 US at 262. The in-state activity which triggers the tax must be examined and the effect that the tax has on interstate activity. *Id.* In this matter, the activity which is being taxed is the use and storage of aircraft parts which are purchased outside of Michigan to be later installed on aircrafts hangered at a Michigan airport. The interstate activity which Zantop is engaged in is the transport of freight throughout the country as well as abroad. Michigan's use tax has no effect on this interstate activity.

The third consideration under the *Complete Auto* test is whether the tax discriminates against interstate commerce. Once again, Zantop has failed to establish any disparaging treatment under the use tax. The activity which is subject to the use tax involves aircraft parts which have come to rest in Michigan. A business engaged in a similar intrastate activity would be subject to the Michigan sales tax. The Michigan use tax does not discriminate against interstate commerce.

Finally, the fourth prong of the *Complete Auto* test focuses on whether the tax is fairly related to the presence and activities of the taxpayer within the state. The Goldberg Court stated:

> The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by

> the State. The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. On the contrary, "interstate commerce may be required to contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct benefit."

Goldberg, 488 US at 266-67 (quoting *Commonwealth Edison*, 453 US at 627). Clearly as a Michigan corporation with a substantial repair facility located in the state, Zantop receives several direct and indirect benefits from the State of Michigan.

THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(c)(10) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition pursuant to MCR 2.116(I)(2) is GRANTED.

Thomas L. Brown

Date: 1-26-99

/s/ Thomas L. Brown
Thomas L. Brown
Circuit Court Judge

Proof of Mailing

I do certify that I have served a copy of the attached order upon each attorney of record by placing a copy of the same in a sealed envelope, addressed to each, with full postage prepaid thereon, and placing said envelope

in the United States mail at Lansing, Michigan on 1-27, 1999.

/s/ Michael M. Shoudy
Michael M. Shoudy
Research Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ZANTOP INTERNATIONAL AIRLINES, INC.,	UNPUBLISHED May 26, 1995
Plaintiff-Appellee,	No. 152381
v	L.C. No. 91-013365
DEPARTMENT OF TREASURY,	
Defendant-Appellant.	

Before: Fitzgerald, P.J., and Brennan, and Batzer,* JJ.

PER CURIAM.

Defendant appeals from an order of summary disposition in favor of plaintiff. We reverse and remand.

Defendant's sole claim on appeal is that the trial court erred in finding that the use tax exemption contained in MCL 205.94(k); MSA 7.555(4)(k), was arbitrary and violated the equal protection clauses of the United States and Michigan Constitutions. We agree.

Equal protection of the law is guaranteed by both the federal and the state constitutions. US Const, Am XIV; Const 1963, art 1, § 2. Both guarantees afford similar protection. *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992). The equal protection guarantee requires that all persons under similar circumstances be treated alike. *El Souri v Dep't of Social Services*,

* Circuit judge, sitting on the Court of Appeals by assignment.

429 Mich 203, 207; 414 NW2d 679 (1987). Equal protection does not require that persons in different circumstances be treated the same. *Thompson v Merritt (Amended Opinion)*, 192 Mich App 412, 424; 481 NW2d 735 (1991). When a legislative classification is challenged as violative of the equal protection guarantee, the test to determine its validity depends on the kind of classification and the nature of the interest affected. *Id.* at 424-425.

Social and economic legislation is examined under the traditional "rational basis" test. *People v Perlos*, 436 Mich 305, 331; 462 NW2d 310 (1990); *Rouge Parkway Associates v City of Wayne*, 423 Mich 411, 421-422; 377 NW2d 748 (1985). Under the rational basis test, legislation is presumed to be constitutional and must be sustained if the classification is rationally related to a legitimate governmental purpose or interest. *Doe, supra* at 662; *Bissell v Kommareddi*, 202 Mich App 578, 580; 509 NW2d 542 (1993). The burden of proof is on the person attacking the legislation to show that the state failure to tax similarly situated enterprises uniformly was arbitrary, intentional, and knowing rather than a mistake or the result of an inadvertence. *Kellogg Co v Dep't of Treasury*, 204 Mich App 489, 496; 516 NW2d 108 (1994); *Orion Twp v State Tax Commission*, 195 Mich App 13, 17; 489 NW2d 120 (1992). A rational basis for legislation exists when any set of facts can be reasonably conceived to justify the discrimination. *Kellogg, supra* at 496; *Wartella v East Detroit*, 161 Mich App 552, 556; 411 NW2d 751 (1987).

The Use Tax Act, MCL 205.91 *et seq*; MSA 7.555(1) *et seq*, provides in pertinent part for the following exemptions:

> (k) A vessel designed for commercial use of registered tonnage of 500 tons or more, if produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce.
>
> * * *
>
> (x) The storage, use, or consumption of any aircraft owned or used by a domestic passenger air carrier operating under a certificate issued by the United States department of transportation pursuant to section 401 of title IV of the federal aviation act of 1958, Public Law 85-726, 49 U.S.C. 1371, if the aircraft is used primarily in the regularly scheduled commercial transport of passengers. [MCL 205.94(k), (x); MSA 7.555(4)(k), (x).]

Despite plaintiff's arguments to the contrary, we are convinced that the legislature's failure to exempt air freight plane parts from the use tax, in a manner consistent with commercial vessels of 500 tons or more, was not a violation of equal protection. Plaintiff has failed to negate every conceivable basis that might support the § 4(k) exemption. The Legislature could rationally have decided to exempt parts for vessels exceeding five hundred tons from the use tax because of desire to promote that industry to locate in Michigan. We would add that our conclusion is not affected by the exemption contained in § 4(x) because that exemption is limited to the storage, use, or consumption of a domestic passenger aircraft.

Reversed and remanded.

/s/ E. Thomas Fitzgerald
/s/ Thomas J. Brennan

BATZER, J. (dissenting).

Plaintiff Michigan corporation is an interstate and foreign carrier of air cargo. Plaintiff conducts its interstate and foreign air freight delivery business among and between approximately forty-five to fifty airports including Willow Run Airport in Ypsilanti. As an air carrier subject to Federal Aviation Administration Rules and Regulations, plaintiff is required to repair and replace on a periodic basis and schedule specified by the FAA certain critical parts to its aircraft called "rotable parts." These "rotable parts" important to the context of this case include engines, engine components, propellers, and other critical operating parts.

The engines, propellers, and components are periodically removed from plaintiff's aircraft pursuant to FAA maintenance schedules, and sent to repair facilities outside the State of Michigan where they undergo routine and specified repair, replacement, overhaul, and upgrading. When the repair and overhaul are completed, they are returned to plaintiff, reinstalled on the aircraft, and the aircraft are placed back into service hauling air freight.

The State of Michigan imposes a use tax on plaintiff's costs incurred in the repair and replacement of these

"rotable parts" on the theory that plaintiff is using, storing, or consuming the parts in Michigan, separate and apart from its operations in interstate commerce.

On the other hand, the maintenance and repair of vessels of 500 tons or more engaged in interstate on the Great Lakes is exempt from Michigan's use tax to which plaintiff is subject. Plaintiff claims that this different use tax treatment violates its constitutional right to the equal protection of the laws.

In 1990, defendant conducted a sales and use tax audit on plaintiff. As a result of the audit, defendant determined that plaintiff owed use taxes on these "rotable parts" in the amount of $757,275.72, including interest and penalties.

Both plaintiff and businesses with vessels of 500 tons or more engaged in Great Lakes shipping are involved in interstate commerce and shipping freight. As the trial judge observed in his well-considered opinion below:

> The main different [sic] between the two, not taking into account superficial differences, is that one utilizes a ship while the other aircraft. The Court is strained to understand the differences afforded these two modes of interstate commerce that warrant one form to receive use tax relief with respect to "provisions, supplies, maintenance and repairs" while the other is not.

I, too, am strained to understand the difference. Defendant at argument offered that perhaps airports put a strain on state resources in terms of connecting highways and such. I had thought that there were significant

federal subsidies for such highways to alleviate the burden on state resources, but in any event, do not dock facilities for the loading and unloading of waterborne cargo and its accompanying land transportation to its ultimate markets also place such burdens on highways and other infrastructures? As to which places the greater burden would likely, in my view, be measured in cargo tonnage loaded and unloaded – a figure of which this Court knows little – and, with all due deference, was, I suspect, far from the legislative mind.

A legislative intent to foster the shipping industry is propounded. Perhaps, but why was the shipping industry entitled to such state fostering over the interstate air freight industry? Self-evident reasons do not jump out. And why is the interstate air freight industry now being fostered through subsequent legislation which temporarily has abrogated the tax? If there were an explicit legislative finding on these issues, I would defer to any such remotely rational finding. In the absence of such, I can only conclude that when it comes to equal protection in this taxation scheme, the rational basis test gives way to Orwellian analysis, wherein all of the similarly situated are equal, but some of the similarly situated are more equal than others. In my view there is an equal protection violation here. *Williams v Vermont*, 472 US 14, 22; 105 S Ct 2465; 86 L Ed 2d 11 (1865); *Allegheny Pittsburgh Coal Co v Co Comm of Webster Co*, 488 US 336; 109 S Ct 633; 102 L Ed 2d 688 (1989); *Racchus Imports Ltd v Dias*, 468 US 263; 104 S Ct 3049; 82 L Ed 2d 200 (1984). See also *MCI Telecomm Corp v Dep't of Treasury*, 136 Mich App 38; 355 NW2d 627 (1984).

In the absence of any legislative finding, the proffered "rational basis" for the legislative exemption for the maintenance and repair of ships of 500 tons or more, but not for air freight haulers, strike me not as genuine rational reasons, but as mere pillows held up by defendant to absorb the attack of plaintiff, until plaintiff, in frustration and exhaustion, ultimately submits.

If there is a rational basis for the unequal use tax treatment here, it wholly escapes me. I would affirm.

/s/ James M. Batzer

Court of Appeals, State of Michigan

ORDER

ZANTOP INTERNATIONAL AIRLINES v
DEPT OF TREASURY

Docket # 152381

L.C. # 91-13365-CM

E. Thomas Fitzgerald
Presiding Judge

Thomas J. Brennan
James M. Batzer
Judges

The Court orders that the motion for rehearing is DENIED.

Judge Batzer would grant rehearing.

[SEAL]

A true copy entered and certified by Ella Williams, Chief Clerk, on

NOV 28 1995
Date

/s/ Ella Williams
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: September 27, 1996

[Names Omitted In Printing]

105137

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff-Appellant,

v

REVENUE DIVISION, MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

SC: 105137
COA: 152381
CC: 91-013365

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

60924
[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 1996 Jacqueline B. MacKinnon

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 18, 1997

Mr. Patrick R. Van Tiflin
Howard & Howard – Suite 500
222 Washington Square, North
Lansing, MI 48933-1817

Re: Zantop International Airlines, Inc.
v. Michigan Department of Treasury, Revenue Division
No. 96-1030

Dear Mr. Van Tiflin:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

STATE OF MICHIGAN
COURT OF CLAIMS

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN

Defendant.
_____/

File No. 91-13365-CM

Hon. Thomas L. Brown

OPINION AND ORDER

Plaintiff in this action moves the Court for summary disposition pursuant to MCR 2.116(C)(10) on Count III of its complaint in that except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.

Plaintiff, a Michigan corporation, operates a fleet of aircraft in the conduct of an interstate and foreign air freight delivery business. In the course of its business, Plaintiff is required by the Federal Aviation Administration (FAA) to replace, repair or rebuild certain parts, referred to as "rotable parts". To comply with the FAA, Plaintiff shipped these "rotable parts" to vendors outside of Michigan for repair during the taxable period in question. When these "rotable parts" were repaired the parts were sent back to Plaintiff who reinstalled them on its aircraft.

In 1990, Defendant conducted a sales and use tax audit on Plaintiff. As a result of this audit, Defendant determined that Plaintiff owed use taxes on these "rotable parts" in the amount of $757,275.72 including interest and penalties.

In Count III of its complaint, Plaintiff alleges that the Michigan Use Tax, 137 PA 94, as amended, MCL 205.91 *et seq*; MSA 7.555(6) *et seq*; violates Plaintiff's right to equal protection of the law as guaranteed by the United States Constitution under the Fourteenth Amendment and the Michigan Constitution of 1963, Article 1, Section 2. Specifically, Plaintiff contends that the legislature's action of creating classifications of modes of interstate commerce which are exempt and Defendant's issuance of a Letter Ruling concerning the exemption of rolling stock, are evidence of its alleged equal protection claim.

The exemptions at issue cited by Plaintiff arise pursuant to MCL 205.94; (k) and (x); MSA 7.555, (4) (k) and (x) which states in pertinent:

> The tax levied shall not apply to:
>
> (k) A vessel designed for commercial use of registered tonnage of 500 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for exclusive use of a vessel of 500 tons or more engaged in interstate commerce.
>
> (x) The storage, use, or consumption of any aircraft owned or used by a domestic passenger air carrier operating under a certificate issued by the civil aeronautics board pursuant to section 401 of title IV of the federal aviation act of

> 1958, 49 U.S.C. 1371, if the aircraft is used primarily in the regularly scheduled commercial transport of passengers.

Further, the Letter Ruling cited by Plaintiff in support of its position states in pertinent part:

> 89-48. Interstate versus Intrastate Rolling stock
>
> You inquire regarding the taxability of rolling stock purchased out of state and placed into interstate commerce outside of Michigan. The vehicles subsequently are converted to use in intrastate commerce in Michigan.
>
> * * *
>
> . . . [I]t is the Department's position that rolling stock purchased and placed into interstate commerce in another state but subsequently converted in Michigan is subject to use tax at the time of conversion.

The Michigan Court of Appeals in *American Amusement Company Inc. v Department of Treasury*, 91 Mich App 573; 283 NW2d 800 (1979), addressed the issue of equal protection violations with regards to a state's taxation scheme. The Michigan Court of Appeals quoting an earlier case stated at 577:

> [T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The state must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . That statute may discriminate in favor of a certain class does not render it arbitrary if

the discrimination is founded upon a reasonable distinction, or difference in state policy.

In applying this rational basis test the Court must determine whether there is a rational relationship between the object of the legislation and the classification. After review of the proofs in this case the Court is of the opinion that there is no rational classification.

The Court agrees with the Defendant's averment as to the exemption applicable to aircraft owned by a domestic airline as set forth by MCL 205.95(x); MSA 7.555(4)(x). Clearly, this exemption only pertains to the storage, use, or consumption of aircraft owned and utilized in the commercial transportation of passengers. There is no mention, either expressly or impliedly, that said exemption applies to parts of the aircraft. In fact, according to the affidavit of Jesse Weaver, Defendant does tax those parts. Moreover, Plaintiff's own aircraft are not subject to taxation under the Michigan Sales or the Michigan Use Tax.

Furthermore, the Court concedes that the subject of the Letter Ruling, that being rolling stock, is remotely similar factually to Plaintiff's situation. The Court takes notice that Letter Rulings are issued by the Department in response to specific questions and fact situations presented by a taxpayer and that they are not to be relied on by other taxpayers. However, Letter Rulings do provide some guidance regarding the Department's position in a given situation. This point is important in the context of this case.

However, the Court finds that the exemption applicable to commercial vessels of 500 tons or more set forth in

MCL 205.94(k); MSA 7.555(4)(k) more closely parallels Plaintiff's situation. Both Plaintiff and businesses which fall under this exemption are involved in interstate commerce and shipping freight. The main difference between the two, not taking into account superficial differences, is that one utilizes a ship while the other utilizes aircraft. The Court is strained to understand the differences afforded these two modes of interstate commerce that warrant one form to receive use tax relief with respect to "provisions, supplies, maintenance, and repairs" while the other is not.

The United States Supreme Court in *Williams v Vermont*, 472 US 14; 105 S Ct 2465; 86 L Ed 2d 11 (1985), quoting an earlier case held at page 19 that "the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation".

In determining whether a particular taxation scheme is rationally based, the Michigan Court of Appeals in *American Amusement* supra, quoting an earlier case discussed the application of the equal protection clause within the context of a state's taxation scheme. The Michigan Court of Appeals held at 577 that the equal protection clause:

> "impose no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable scheme of state taxation. The state may impose different specific taxes upon different trades and professions and may very [sic] the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with

> reference to composition, use or value. [citation omitted]

The Court finds that when read individually, Plaintiff's averments as to the applicability of the exemptions available under the Michigan Use Tax and the Letter Ruling at issue are weakened by their differences to Plaintiff's situation.

However, it is the opinion of the Court that, when read as a whole the exemptions to the Michigan Use Tax evidence an arbitrary approach by Defendant as it applies to the taxation of different instrumentalities of interstate commerce in violation of equal protection.

Therefore, the Court finds that Plaintiff's allegations in Count III have merit. Thus, Plaintiff's motion for summary disposition as to Count III is GRANTED.

Date: 2-26-92

/s/ Thomas L. Brown
Thomas L. Brown,
Circuit Judge

STATE OF MICHIGAN
COURT OF CLAIMS

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff,

vs.

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

Docket No. 99-13365-CM

HON. JUDGE THOMAS L. BROWN

PATRICK R. VAN TIFLIN (P26119)
ELLEN M. HARVATH (P42170)
HOWARD & HOWARD ATTORNEYS, P.C.
Attorneys for Plaintiff
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, Michigan 48933
(517) 485-1483

COMPLAINT FOR REFUND OF USE TAX

NOW COMES the Plaintiff, Zantop International Airlines, Inc., by and through its attorneys Howard & Howard Attorneys, P.C., and for its Complaint against the Defendant herein, alleges as follows:

1. Plaintiff is a Michigan corporation with its Michigan office located at Willow Run Airport in Ypsilanti, Michigan.

2. Defendant Revenue Division of the Department of Treasury, State of Michigan, is the statutorily designated collection agent for the Michigan Use Tax imposed pursuant to MCL §205.91, *et seq.*; MSA §7.555 *et seq.*, (hereinafter "the Act").

3. The taxes involved are Michigan Use Taxes for the period beginning October 1, 1986 to March 31, 1990 relating to the acquisition of airplane parts (hereinafter referred to as "the parts") which are required by the Federal Aviation Administration to be replaced, repaired, rebuilt or overhauled for aircraft operated by Plaintiff in interstate and foreign commerce.

4. During the period in question, Plaintiff operated a fleet of aircraft (hereinafter referred to as "the aircraft") in its interstate and foreign air freight delivery business conducted between approximately 45 to 50 airports in the United States, including Willow Run Airport.

5. The aircraft are not subject to taxation under the Michigan Sales or the Michigan Use Tax.

6. In Plaintiff's experience, and due to the financial expediency of avoiding excessive investment of working capital in idle parts, the acquisition date and installation date of the parts in question have generally been in close proximity.

7. Parts such as engines, propellers, and components thereof are and have been serviced by overhauling companies located outside of Michigan.

8. Generally, when such parts are needed, the parts are shipped to the required location for preparation and

installation on the aircraft, thereby eliminating the need for storage in Michigan.

9. On March 11, 1991 Defendant issued to Plaintiff Bill for Taxes Due (Final Assessment) E763576 for Michigan Use tax relating to the acquisition of the parts in the amount of $541,329 together with a penalty in the amount of $54,134 and interest in the amount of $161,812.72. A copy of the Bill for Taxes Due is attached hereto as Exhibit 1.

10. On April 8, 1991 Plaintiff paid to Defendant under protest the entire amount of tax, penalty and interest claimed to be due under Bill for Taxes Due (Final Assessment) E763576. A copy of the letter transmitting the payment under protest is attached hereto as Exhibit 2.

11. Plaintiff hereby sues for refund of Michigan Use Tax, penalty and interest paid with respect to parts in the aggregate amount of $757,725.72 plus statutory interest, costs, and attorney fees.

COUNT I

NON-TAXABLE USE

12. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 11 of this Complaint, as if more fully set forth herein.

13. The Michigan Use Tax is imposed upon the privilege of using, storing, or consuming tangible personal property within the State of Michigan.

14. For purposes of the Michigan Use Tax, it is presumed that tangible personal property purchased outside the State of Michigan is subject to the tax if the property is brought into the state within 90 days of the purchase date as having been acquired for storage, use or other consumption within Michigan.

15. The presumption set forth in the Act is not a conclusive presumption and can be overcome by showing the use to which the aircraft parts were actually put.

16. The initial and continuing use of the aircraft and its constituent parts are interstate in character.

17. The aircraft and its constituent parts were not acquired for use in Michigan, but were acquired for initial and continual use in interstate and foreign commerce.

18. Plaintiff has not exercised a privilege of use of the aircraft parts in Michigan separate and distinct from its use of the aircraft and its constituent parts in interstate commerce.

19. The sole and exclusive purpose for bringing the aircraft parts into Michigan is to become an integral part of interstate commerce.

20. Under these circumstances, no presumption can arise that Plaintiff acquired the aircraft parts for use in the State of Michigan or, in the alternative, if such a presumption does arise, it cannot be sustained, since the continuous and uninterrupted interstate and foreign use of the aircraft and its constituent parts adequately rebuts the presumption.

WHEREFORE, Plaintiff prays that this Court find and determine as follows:

(a) That the aircraft parts, as integral parts of instrumentalities of interstate commerce, were not used in a taxable use in the State of Michigan, and therefore, are not within the scope of taxation imposed by the Michigan Use tax, and

(b) That the aircraft parts may not be presumed to have been acquired for use within the State of Michigan, or if such presumption arises, the facts alleged adequately rebut the presumption, and

(c) That Plaintiff is entitled to a refund of Use Tax, interest and penalty paid in relation to the acquisition of the aircraft parts in the amount of $757,725.72 together with statutory interest, court costs and attorney fees, and

(d) That Plaintiff shall have such other and further relief to which this Court shall find Plaintiff to be justly entitled.

COUNT II

TAXABLE MOMENT

21. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 20 of this Complaint as if more fully set forth herein.

22. Under standards adopted by the United States Supreme Court, in order for a state to impose a tax on the privilege of the use of property within its borders, it must establish that there was a "taxable event or moment"

upon the initial entry of the property into the state, or, in the alternative, that there was a taxable moment after the initial entry into the state.

23. Michigan law employs the "taxable moment" test in determining whether Michigan Use Tax may be imposed upon an aircraft and its constituent parts acquired outside the State of Michigan which have been transported into the state and have not lost their interstate character due to continual movement in interstate commerce.

24. Whether an object has "come to rest" is important for determining whether a "taxable moment" has occurred under Michigan law.

25. No "taxable moment" has occurred because the aircraft and its constituent parts in question have never "come to rest" in Michigan and have never lost their interstate commerce character and have been continually used in interstate commerce since Plaintiff acquired them.

26. The Commerce Clause of the United States Constitution forbids the undue burdening of interstate commerce or its instrumentalities by state taxation.

27. A state tax upon interstate commerce satisfies the Commerce Clause where (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to services provided by the state.

28. As the aircraft and its constituent parts were and are used continually in interstate commerce, the Michigan Use Tax which is the subject of this proceeding

does not relate to an activity with substantial nexus with Michigan.

29. As the use of the aircraft and its constituent parts in interstate commerce results in a predominant use of the aircraft and its constituent parts occurring outside the borders of the State of Michigan, the Use tax is not fairly apportioned in relation to the use of the aircraft in Michigan and other states since the entire amount of the Use tax relating to these aircraft parts was paid to the State of Michigan.

30. The aircraft and its constituent parts acquired by Plaintiff and continually used in interstate commerce are not so clearly and uniquely connected to Michigan that Michigan has the right to impose an unapportioned use tax on the entire value of the parts.

31. As the predominant use of the aircraft and its constituent parts by Plaintiff occurs outside of the borders of the State of Michigan, the Use tax collected by Defendant with respect to the aircraft parts is not fairly related to services provided by Defendant to Plaintiff with respect to the aircraft parts.

32. The Equal Protection, Due Process and Commerce Clauses of the United States Constitution have been interpreted and applied to prohibit a state from taxing activities or values which occur or exist beyond the borders of the taxing state.

33. The United States Constitution has been interpreted and applied so as to require that the tax base subject to tax in any state, including Michigan, must bear a reasonable relation to the activity proposed to be taxed.

34. The United States Supreme Court has held that there must exist a rational relationship between the tax base attributed to the taxing state and the intrastate values being taxed.

35. The imposition of Michigan Use Tax on the aircraft and its constituent parts constitutes an undue burden and therefore is an impermissible taxation on interstate commerce and is in violation of the Commerce Clause of the United States Constitution and Michigan law because no taxable moment or event has occurred which can legally support such taxation.

WHEREFORE, Plaintiff prays that this Court find and determine as follows:

(a) That the imposition of Michigan Use Tax upon the aircraft parts which have not lost their interstate character is contrary to the United States Constitution and the law of the State of Michigan, and

(b) That Plaintiff is entitled to a refund of Use Tax, penalty and interest paid in relation to its acquisition of the aircraft parts in the amount of $757,275.72 together with statutory interest, court costs and attorney fees, and

(c) That Plaintiff shall have such other and further relief to which this Court shall find Plaintiff to be justly entitled.

COUNT III

EQUAL PROTECTION OF THE LAWS

36. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 35 of this Complaint as if more fully set forth herein.

37. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Michigan Constitution, Const 1963, art I, §2, prohibit arbitrary classifications, not rationally based, which discriminate between classes of taxpayers.

38. Section 94(k) of the Use Tax Act, MCL 205.93(k); MSA 7.555(4)(k), excludes from taxation thereunder a vessel designated for commercial use of registered tonnage of 400 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel engaged in interstate commerce.

39. Section 94(x) of the Use Tax Act, MCL 205.94(3)(x); MSA 7.555(4)(x), excludes from taxation thereunder aircraft owned or used by domestic passenger air carriers operating under a certificate issued by the Civil Aeronautics Board pursuant to the Federal Aviation Act, if the aircraft is used primarily in the regular scheduled commercial transport of passengers.

40. In Department of Treasury Letter Ruling 89-47 then Commissioner of Revenue Louis W. Duncan ruled in response to a taxpayer request for a ruling that "rolling stock" purchased out of state and placed into interstate commerce is not taxable by Michigan under the Use Tax Act unless and until the rolling stock is removed from

interstate commerce and is converted to an intrastate use, and becomes taxable only at the time of conversion.

41. Neither the Act itself or the implementation of the Act by the Revenue Division makes a similar exclusion for an aircraft or its constituent parts used to transport freight as is provided for waterborne vessels, passenger aircraft and rolling stock.

42. The creation of such a classification of instrumentalities of interstate commerce and the granting of favorable tax status to certain classes and the withholding of favorable tax status from another is palpably arbitrary and no rational basis exists for such a system of classification.

43. Such disparate treatment constitutes a violation of Plaintiff's right to equal protection under the Fourteenth Amendment of the United States Constitution and the Michigan Constitution, Const 1963, art. I, §2.

44. The implementation of such an arbitrary and capricious classification has resulted in a Use Tax penalty and interest liability of Plaintiff of $757,275.72 in excess of its legal liability.

WHEREFORE, Plaintiff prays that this Court find and determine as follows:

(a) That the statutory classification and discrimination made for purposes of Michigan Use Tax, between waterborne vessels domestic aircraft or rolling stock and an aircraft and its constituent parts used to transport freight, all operating in interstate

commerce, constitutes a violation of Plaintiff's right to equal protection of the law, and

(b) That Plaintiff is entitled to a refund of Michigan Use Tax, penalty and interest in the amount of $757,725.72 plus statutory interest, costs and attorney fees, and

(c) That Plaintiff shall have such other and further relief to which this Court shall find Plaintiff to be justly entitled.

Respectfully submitted,

HOWARD & HOWARD
ATTORNEYS, P.C.
Attorneys for Plaintiff

Dated: June 7, 1991

By /s/ _____
Patrick R. Van Tiflin
(P26119)
Ellen M. Harvath (P42170)

ZANTOP INTERNATIONAL
AIRLINES, INC.

By: /s/ _____
Robert C. Dillon

Its: Vice President-Finance

VERIFICATION

STATE OF MICHIGAN)
) ss.
COUNTY OF INGHAM)

On this 7th day of June, 1991, personally appeared before me Robert C. Dillon, Vice President-Finance for Zantop International Airlines, Inc., the Plaintiff in the within cause, and stated that he has read the foregoing Complaint for Refund of Use Tax and that he believes the contents thereof to be true to the best of his knowledge, information and belief.

/s/ _____
Peggy A. Hicks
Notary Public, Ingham
County, MI
My commission expires:
1-23-95

UNITED STATES CONSTITUTION

ARTICLE I, SECTION 8, CLAUSE 3 REGULATION OF COMMERCE

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

UNITED STATES CONSTITUTION

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As codified during the taxable period at issue, the Michigan Use Tax Act provided, in pertinent part, as follows –

MICHIGAN COMPILED LAWS

The People of the State of Michigan enact:

205.91. Short title

Sec. 1. This act may be cited as the "Use Tax Act".

205.92. Definitions

Sec. 2. As used in this act:

(a) "Person" means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether or not organized for profit, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) "Use" means the exercise of a right or power over tangible personal property incident to the

ownership of that property including transfer of the property in a[1] transaction where possession is given.

(c) "Storage" means any keeping or retention in this state for any purpose losing its interstate character.

(d) "Seller" means the person from whom a purchase is made and includes every person selling tangible personal property or services for storage, use, or other consumption in this state. If, in the opinion of the department, it is necessary for the efficient administration of this act to regard a salesperson, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom the person operates or from whom he or she obtains tangible personal property or services sold by him or her for storage, use, or other consumption in this state, irrespective of whether or not he or she is making the sales on his or her own behalf or on behalf of the dealer, distributor, supervisor, or employer, the department may so consider him or her, and may consider the dealer, distributor, supervisor, or employer as the seller for the purpose of this act.

(e) "Purchase" means acquired for a consideration, whether the acquisition was effected by a transfer of title,[2] of possession, or of both, or a license to use or consume; whether the transfer was absolute or conditional, and by whatever means the transfer was effected; and whether consideration is a price or rental in money, or by way of exchange or barter.

---

[1] 1987 P.A. 260, effective December 28, 1987, substituted "of the property in a" for "thereof in any."

[2] Prior to the passage of 1988 P.A. 506, effective December 29, 1988, the word "or" preceded the phrase "of possession."

(f) "Price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property or services were purchased or rented for storage, use, or other consumption in this state, without a deduction for[3] the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense.

* * *

(g) "Consumer" means the person who has purchased tangible personal property or services for storage, use, or other consumption in this state and includes a person acquiring tangible personal property when engaged in the business of constructing, altering, repairing, or improving the real estate of others.

(h) "Business" means all activities engaged in by a person or caused to be engaged in by a person with the object of gain, benefit, or advantage, either direct or indirect.

(i) "Department" means the revenue division of the department of treasury.

(j) "Tax" includes all taxes, interest, or penalties levied under this act.

(k) "Tangible personal property" includes[4] computer software offered for general use by the public

---

[3] Prior to the pasage of 1987 P.A. 260, this phrase was "without any deduction on account of."

[4] 1988 P.A. 506, effective December 28, 1987, inserted ", beginning December 28, 1987," prior to the phrase "computer software."

or software modified or adapted to the user's needs or equipment by the seller, only if the software is available from a seller of software on an as is basis or as an end product without modification or adaptation. Tangible personal property does not include computer software originally designed for the exclusive use and special needs of the purchaser. As used in this subdivision, "computer software" means a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result.

205.93. Rate; presumption

Sec. 3. (1) **Levy; presumption.** There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state, which tax shall be equal to 4% of the price of the property, or services specified in section 3a,* and to the tax there shall be added penalties and interest where applicable as provided in this act. For the purpose of the proper administration of this act and to prevent the evasion of the tax, it is presumed that tangible personal property purchased is subject to the tax if brought into the state within 90 days of the purchase date and is considered as

---

* Section 205.93a.

acquired for storage, use, or other consumption in this state.[5]

(2) **Vehicles, ORV's, mobile homes, aircraft, snowmobiles, watercraft; collection of tax, price tax base.** The tax imposed by this section for the privilege of using, storing, or consuming a vehicle, ORV, mobile home, aircraft, snowmobile, or watercraft shall be collected before[6] the transfer of the vehicle, ORV, mobile home, aircraft, snowmobile, or watercraft, except a transfer to a licensed dealer or retailer for purposes of resale, that arises by reason of a transaction made by a person who does not transfer vehicles, ORV's, mobile homes, aircraft, snowmobiles, or watercraft in the ordinary course of his or her business done in this state.

* * *

The tax on an aircraft shall be collected by the department of treasury. Notwithstanding any limitation contained in section 2,† the price tax base of any vehicle, ORV, mobile home, aircraft, snowmobile, or watercraft subject to taxation under this act[7] shall be not less than its

---

[5] 1990 P.A. 86, effective June 6, 1990, substituted "is" for "shall be" in the second sentence.

[6] 1990 P.A. 86 substituted "before" for "prior to," and made several other nonsubstantive changes to this subsection.

† Section 205.92.

[7] Prior to the enactment of 1990 P.A. 86, the phrase ", except as authorized by section 2(f) on and after January 1, 1984 and until the effective date of this 1984 amendatory act, for a motor vehicle, trailer coach, or titled watercraft," followed the phrase "under this act."

retail dollar value at the time of acquisition thereof as fixed pursuant to rules promulgated by the department.

(3) The following transfers or purchases are not subject to use tax:[8]

(a) When the transferee or purchaser is the spouse, mother, father, brother, sister, child, stepparent, stepchild, stepbrother, stepsister, grandparent, grandchild, legal ward, or a legally appointed guardian with a certified letter of guardianship, of the transferor.

(b) When the transfer is a gift to a beneficiary in the administration of an estate.

(c) When a vehicle, ORV, mobile home, aircraft, snowmobile, or watercraft that has once been subjected to the Michigan sales or use tax is transferred in connection with the organization, reorganization, dissolution, or partial liquidation of an incorporated or unincorporated business and the beneficial ownership is not changed.

(d) When an insurance company licensed to conduct business in this state acquires ownership of a late model distressed vehicle as defined in section 12a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.12a, of the Michigan Compiled Laws, through payment of damages in response to a claim or when the person who owned the vehicle before the insurance company reacquires ownership from the company as part of the settlement of a claim.

---

[8] Prior to the passage of 1990 P.A. 86, this paragraph read: "No use tax shall be payable in cases of transfer or purchase:" 1990 P.A. 86 also substituted "that" for "which" in subsection (3)(c), and added subsection (3)(d).

(4) The department may utilize the services, information, or records of any other department or agency of state government in the performance of its duties under this act, and other departments or agencies of state government are required to furnish those services, information, or records upon the request of the department.

205.94 Exemptions.

Sec. 4. The tax levied shall not apply to:

Commercial vessels of 500 tons or more, supplies, repairs.

(k) A vessel designed for commercial use of registered tonnage of 500 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce.

205.94. Exemptions

Sec. 4. The tax levied shall not apply to:

* * *

Storage, use, or consumption of aircraft.

(x) The storage, use, or consumption of any aircraft owned or used by a domestic passenger air carrier

operating under a certificate issued by the civil aeronautics board pursuant to section 401 of title IV of the federal aviation act of 1958, 49 U.S.C. 1371, if the aircraft is used primarily in the regularly scheduled commercial transport of passengers.

MICHIGAN DEPARTMENT OF TREASURY LETTER RULING 89-48

89-48. Interstate Versus Intrastate Rolling Stock

You inquire regarding the taxability of rolling stock purchased out of state and placed into interstate commerce outside of Michigan. The vehicles subsequently are converted to use in intrastate commerce in Michigan.

In *Complete Auto Transit, Inc. v. Charles R. Brady, Jr.*, 430 US 274 (1977), the United States Supreme Court rejected the view that the states cannot tax interstate commerce but did impose limits on state taxation of interstate commerce. In *Complete Auto Transit,* the Court determined that a state's tax would be constitutionally valid provided it meets the following four-prong test:

1. It applies to an activity with a substantial nexus within the taxing state,
2. it is fairly apportioned,
3. it does not discriminate against interstate commerce, and
4. it is fairly related to the services provided by the state.

Using the four prong test, the following conclusions can be made:

1. In the instant case, the taxpayer clearly has substantial nexus with Michigan due to its intrastate trucking activity.
2. The Michigan use tax is fairly apportioned. No other state will tax the vehicles as the use is entirely within Michigan.

3. The Michigan use tax does not discriminate against interstate commerce because the property has become a part of the mass of property within this state.

4. The taxpayer receives the benefits of services such as police and fire protection, and particularly use of the roads in this state.

It appears that all four prongs of the *Complete Auto Transit* test are satisfied under the facts you present. Therefore, it is the Department's position that rolling stock purchased and placed into interstate commerce in another state but subsequently converted to intrastate commerce in Michigan is subject to use tax at the time of conversion. See MCL 205.91 et seq.

August 15, 1989
LR 89-48

Louis W. Duncan
Acting Commissioner of Revenue

STATE OF MICHIGAN
COURT OF CLAIMS

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

Docket No. 91-13365-CM

Hon. Thomas L. Brown

Patrick R. Van Tiflin (P26119)
Michele L. Halloran (P29973)
Attorneys for Plaintiff
HOWARD & HOWARD
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, MI 48933
(517) 485-1483

Daniel M. Greenberg (P28843)
Assistant Attorney General
Attorney for Defendant
First Floor, Treasury Building
Lansing, MI 48922
(517) 373-3203

PARTIAL STIPULATION OF FACTS

NOW COME Zantop International Airlines, Inc., the Plaintiff herein, by and through its attorneys, Howard &

Howard Attorneys, P.C., and the Revenue Division, Department of Treasury, state of Michigan, by and through its attorneys, Frank J. Kelley, Attorney General, and Russell E. Prins and Daniel M. Greenberg, Assistant Attorneys General, and present the following partial stipulation of facts in the above-captioned matter, which partial stipulation may be supplemented by evidence adduced at trial:

1. Plaintiff is a Michigan corporation with its Michigan office located at Willow Run Airport in Ypsilanti, Michigan.

2. Defendant, the Revenue Division, Department of Treasury, state of Michigan, is the statutorily-designated collection agent for the Michigan use tax imposed by 1937 PA 94, as amended, MCL 205.91 *et seq.*; MSA 7.555(1) *et seq.*

3. The taxes involved in this matter are Michigan use taxes for the period beginning October 1, 1986 and ending March 31, 1990.

4. Subsequent to an audit, on March 11, 1991, Defendant issued to Plaintiff Bill for Taxes Due (Final Assessment) E763576 for Michigan use tax in the amount of $541,329, penalty in the amount of $54,134, and interest in the amount of $161,812.72, a total alleged liability of $757,725.72.

5. On April 8, 1991, Plaintiff paid to Defendant under protest the entire amount of tax, penalty and interest claimed by Defendant to be due under Bill for Taxes Due (Final Assessment) E763576.

6. Throughout the audit period, Plaintiff operated a fleet of aircraft in an air freight delivery business it conducts in interstate commerce.

7. The use tax assessed relates in part to Plaintiff's acquisition of aircraft parts, including engines, compressors and propellers, and components of engines, compressors, and propellers, which are required by the Federal Aviation Administration (FAA) to be periodically removed from the aircraft and repaired, replaced or overhauled.

8. After they are removed from Plaintiff's aircraft, the parts which require repair or overhaul are sent to repair shops located outside of Michigan for the requisite work, and are then returned to Michigan for installation on Plaintiff's aircraft.

9. Throughout the audit period, Plaintiff, motivated by the financial expediency of avoiding an excessive investment of working capital in idle parts, adhered to a system which was intended to align as closely as possible the date upon which repaired or overhauled parts were delivered to Plaintiff's location in Ypsilanti to the date upon which the parts were installed on Plaintiff's aircraft.

10. The state of Michigan did not seek to impose a tax with respect to Plaintiff's cargo aircraft for the audit period in issue under the Michigan Sales Tax Act, 1933 PA 167, as ameded, MCL 205.51 *et seq.;* MSA 7.521 *et seq.*, or the Michigan Use Tax Act, 1937 PA 94, as amended, MCL 205.91 *et seq.;* MSA 7.555(1) *et seq.*

11. During the audit period, Plaintiff, in the conduct of the freight transport business it operated in interstate

commerce, did not engage in any wholly intrastate flights, except for approximately ten flights which were mandated by the Federal Aviation Administration to assure the governmental agency that Plaintiff's pilots were equipped with the technical expertise to fly Plaintiff's aging fleet.

12. During the audit period, Plaintiff conducted its air freight delivery business between 45 to 50 airports within the United States.

13. During the audit period, Plaintiff maintained two facilities for major aircraft repair, one at Willow Run airport in Ypsilanti, Michigan, the other in Macon, Georgia.

14. During the audit period, Plaintiff undertook numerous interstate flights to and from its airport facility in Ypsilanti, Michigan.

15. Plaintiff has not paid a sales or use tax with respect to any of the parts taxed pursuant to Bill For Taxes Due (Final Assessment) E763576 (as paid under protest by Plaintiff) to any state other than Michigan.

16. For the calendar years 1987, 1988 and 1989, Plaintiff had the following numbers of full-time system employees:

Year	Full-Time System Employees
1987	1,663
1988	1,517
1989	1,398

For the calendar years 1987, 1988 and 1989, Plaintiff had the following numbers of full-time employees assigned to work locations in Michigan:

Year	Michigan Location Employees
1987	812
1988	750
1989	645

Respectfully submitted,

HOWARD & HOWARD
Attorneys for Plaintiff

Dated: February 25, 1992

By: /s/ Michele L. Halloran
Patrick R. Van Tiflin
(P26119)
Michele L. Halloran
(P29973)

FRANK J. KELLEY
Attorney General

Russell E. Prins (P19110)
Daniel M. Greenberg (P28843)

Dated: February 25, 1992

By: /s/ Daniel M. Greenberg
Daniel M. Greenberg
Assistant Attorney General
Attorney for Defendant

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ZANTOP INTERNATIONAL AIRLINES, INC.,

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant.

Case No. 91-13365-CM

HON. THOMAS L. BROWN

Patrick R. Van Tiflin (P26119)
Daniel L. Stanley (P57052)
HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Plaintiff
The Phoenix Building
222 N. Washington Square,
Suite 400
Lansing, MI 48933
517/377-0702

ROSS H. BISHOP (P25973)
Assistant Attorney General
Attorney for Defendant
First Floor, Treasury Building
Lansing, MI 48922
517/373-3203

PARTIAL STIPULATION OF FACTS

The parties stipulate to the following facts:

1. Plaintiff and Defendant stipulate to the accuracy of the content of Exhibit 5. This exhibit summarizes information contained in Aircraft Activity Reports and reports submitted to the U.S. Department of Transportation by Plaintiff regarding the use of Plaintiff's aircraft for calendar years 1986 through 1990.

2. The parties, by entering into this stipulation of facts, are not precluded from asserting facts that are not inconsistent with the facts set forth above or from entering into additional stipulations.

HONIGMAN, MILLER, SCHWARTZ
AND COHN, Attorneys for Plaintiff

By: /s/ Patrick R. Van Tiflin (P26119)

Dated: 10-15-98

FRANK J. KELLEY, Attorney General,
Attorney for Defendant

By: /s/ Ross H. Bishop
Ross H. Bishop (P25973)
Assistant Attorney General

Dated: 10-26-98

ZANTOP INTERNATIONAL AIRLINES, INC.
MICHIGAN INTRASTATE STATISTICS

	1986	1987	1988	1989	1990	TOTAL FOR 5 YEAR PERIOD
MICHIGAN INTRASTATE FLIGHT MILES:	1,444	1,696	3,304	1,202	1,233	8,879
TOTAL FLIGHT MILES:	12,157,499	12,964,282	9,491,870	7,248,077	8,609,826	50,471,554
RATIO:	0.0001	0.0001	0.0003	0.0002	0.0001	0.0002
MICHIGAN INTRASTATE AIRBORNE HOURS:	11.9	16.2	20.1	11.4	16.9	76.5
TOTAL AIRBORNE HOURS:	41,421	42,728	33,684	26,224	31,432	175,489
RATIO:	0.0003	0.0004	0.0006	0.0004	0.0005	0.0004
MICHIGAN INTRASTATE DEPARTURES AND ARRIVALS:	88	80	96	58	80	402
TOTAL DEPARTURES AND ARRIVALS:	50,990	50,810	36,470	31,952	39,598	209,820
RATIO:	0.0017	0.0016	0.0026	0.0018	0.002	0.0019
TOTAL COMPANY WIDE DEPARTURES:	25,495	25,405	18,235	15,976	19,799	104,910
MICHIGAN INTRASTATE DEPARTURES:	44	40	48	29	40	201
TOTAL DEPARTURES LESS MI INSTRASTATE DEPARTURES:	25,451	23,365	18,187	15,947	19,759	104,709
AIRCRAFT ON HAND AT DECEMBER 31:	44	43	36	34	31	
AVERAGE NUMBER OF NON MICHIGAN DEPARTURES PER DAY PER AIRCRAFT:	1.6	1.6	1.4	1.3	1.7	

SOURCES:

MICHIGAN INTRASTATE DATA: ZANTOP INTERNATIONAL AIRLINES, INC. AIRCRAFT ACTIVITY REPORT CRP492
TOTAL SYSTEM DATA: U.S. DEPT. OF TRANSPORTATION R.S.P.A. FORM 41, SCHEDULE T-8.

[LOGO] House Legislative Analysis Section
650 Roosevelt Building
Phone: 517/373-6466

NO USE TAX ON SIMMONS AIRCRAFT

HOUSE BILL 5801 with committee amendments First Analysis (11-20-84)

Sponsor: Rep. Dominic Jacobetti
Committee: Taxation

THE APPARENT PROBLEM:

Due to the vagaries of federal and state laws, an airline must pay the Michigan use tax on its aircraft only if it introduces the planes into service here. Simmons is the only regularly scheduled interstate airline whose headquarters are in Michigan, and prepares its planes for service in Marquette. In order to avoid being the only airline in the country liable for the Michigan use tax, Simmons must undergo the inconvenience and expense of flying its new planes from company headquarters to an airport outside the state for introduction into interstate service. The company suggests that requiring it to pay the tax when no other airline must is unfair to a Michigan business, and discourages the establishment of other airlines here.

THE CONTENT OF THE BILL:

The bill would exempt from the use tax the storage, use, or consumption of any aircraft owned or used by a domestic passenger carrier operating under a certificate issued by the Civil Aeronautics Board if the aircraft is

used primarily in the regularly scheduled commercial transportation of passengers.

FISCAL IMPLICATIONS:

According to the Department of Treasury, the bill would cost the state nothing, since Simmons already avoids the tax by introducing its planes into service outside the state.

ARGUMENTS:

For:

The bill would, be exempting aircraft used by regularly scheduled airlines from the use tax, remove potential liability and present inconvenience for Simmons airlines and encourage the establishing of other commercial carriers in Michigan.

POSITIONS:

Simmons Airlines supports the bill. (11-14-84)

The Department of Treasury does not oppose the bill. (11-14-84)